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NOTES.

The Last Days of Bondage in Great Britain.

IN the light of Mr. Leadam's most interesting article on 'The Last Days of Bondage in England,' which appeared in a recent number of the Law Quarterly Review [1], it may be well to note that, while bondage came to an end in England towards the end of the sixteenth century, it only disappeared from Great Britain within the lifetime of people still living. Down to the year 1799 a large number of the Scottish colliers and salt-workers, or 'salters' as they were called, were literally slaves. They belonged to their respective works and were sold as a part of the gearing. They could not leave at will, nor change their occupation. Generation after generation lived in this state of servitude, for, while the servitude was not hereditary in the eye of the law, it was so in practice. The child of a bondman, if never entered with the work, was free, but, belonging as it did to a degraded and avoided class, entering was its natural destination, especially as the owner of the work prevented to the best of his power the possibility of its getting employment in the neighbourhood. The Scottish Habeas Corpus Act passed in 1701, which provided for the liberty of the subject in Scotland and introduced regulations against 'wrongous imprisonment and undue delay in trials,' contained these words, 'it is hereby provided and declared that this present Act is noways to be extended to colliers or salters.' The first Act passed for their relief became law in 1775. This statute (15 George III. c. 28), after stating in the preamble that 'many colliers and salters were in a state of slavery and bondage,' emancipated all those who should begin to work as colliers and salters after the first of July 1775,

[1] Vol. ix. p. 348.

and provided for the gradual liberation of the existing bondmen. This Act did not work well. While it effectually prevented new slavery, it required any existing bondman, who desired to obtain his liberty, to institute legal proceedings for that purpose, with all the accompanying expense and delay. Few of the existing bondmen could take advantage of it. In June 1799 another Act (39 George III. c. 56) was passed, providing that 'all the colliers in Scotland, who were bound colliers at the passing of the fifteenth George Third, chapter 28, shall be free from their servitude.' With this Act perished the last relic of legal slavery in the island of Great Britain.

There was a colony of these salt-workers at Prestonpans near Edinburgh. They were the lineal representatives of the old *nativi*, neyfs or villeins, attached to the Abbey of Newbattle, the monks of which had been the first to work the salt works there. These salters formed a race apart. Sunk in hereditary degradation, they were disliked and shunned by all their neighbours. It was not until some time had elapsed from their final emancipation that the evil effects of this slavery disappeared. William Chambers, of Edinburgh, recorded in his 'Memoir' that, when he was a young man, these poor creatures set aside one day in the year as a festival commemorative of their liberation. And this was in Scotland and in the nineteenth century!

J. A. Lovat-Fraser.

Stephen Martin Leake.

It was an inadvertence that our last number should not have recorded the loss to legal study caused by the death of Mr. Stephen Martin Leake. The outlines of his uneventful life were set forth in obituary notices at the time: and we need only to note the rare combination of circumstances which has given to us a series of legal treatises so clear in design, so ample in treatment, so practical in character.

Mr. Leake was born in 1826. He was called to the Bar in 1853; he retired from the active work of his profession, partly from fear of increasing deafness, in 1863. Thenceforth he lived on his property in Hertfordshire until his death.

Men have retired before now into the country to obtain quiet and freedom from interruption for the pursuit of abstract inquiry, or the contemplation of natural phenomena; but it is seldom indeed that the life of a country gentleman is also a life of close and continuous study bearing on a subject wherein principle and precedent have to be constantly applied and moulded to the changing conditions and the practical business of every day. For

Mr. Leake, though he ceased to practise at the Bar, did not become a speculative jurist. Whether he treats of the rules of pleading, the law of contract, or the law relating to interests in land, he kept in view two objects which make his work valuable alike to the student and the practising barrister. He supplies all the information that the reader is likely to want, and he supplies it in the place where a sensible reader is likely to expect to find it. To say that books are stored with knowledge, and that this knowledge is well arranged, may not seem to say very much. But those who know the mass of detail which, in some sort of arrangement, goes to make up a legal treatise; those who have wandered in the wilderness of ill-compacted learning of which so many text-books consist; still more, those who have tried for themselves to select and arrange the material for a work on any great department of our law, will appreciate, to the full, the happy combination of learning and method displayed in the writings of Mr. Leake.

His works were three in number. With Mr. Bullen he published in 1860 the well-known Precedents of Pleadings, which passed into a second edition in 1863, and a third, for which Mr. Leake was alone responsible, in 1868. Although the forms of pleading here set forth are no longer in use, it would be a mistake to suppose that the book is obsolete: it is a storehouse of good law clearly put. His book on Contract, which appeared in 1867, was in its first edition the most scientific treatise on this branch of law, and in its later editions the most exhaustive Digest of the subject. His work on the law relating to land was not carried out to the full. The first volume (1874) contained two parts, the Sources of the law of Property in land, and the various Estates and Limitations of interest in land; the second volume (1888) contained one part, the law relating to Uses and Profits of land. Two more parts were contemplated; one dealing with the Transfer of Property in land; the last with the law of Persons in so far as it modified the general law of real property. The whole was designed to constitute a Digest of the land-law, with which the author hoped to aid the labours of the student, the practitioner, and the law reformer. So much as we possess of this great work exhibits the general characteristics of Mr. Leake's treatment, its learning, its method, its unpretending clearness of style.

No class of literature is more evanescent than the legal text-book; the Courts and the legislature are always at work upon its materials, and by the time it is appreciated it has ceased to be authoritative. The text-book writer would seem to have inscribed his name upon the sands; and yet the man who has produced a clear and full statement of any one branch of our current legal

system has deserved well of his generation, and makes a solid contribution to the history of English law. Among the many eminent writers whom that history records some place will surely be found for the great learning, the clear intellect, the patient unselfish industry of Mr. Leake. W. R. A.

The pleadings and other proceedings in the Behring's Sea Arbitration bind up into seven or eight folio volumes, containing much interesting matter. The proceedings at Geneva in 1872 were equally lengthy, but lost much in value from the fact that the arguments on that occasion started from the *ex post facto*, arbitrary and now generally discredited 'Three Rules of the Treaty of Washington.' The Paris tribunal, on the other hand, was free to declare and apply the generally received principles of International law. Even if its award can hardly be cited, to use the words of the leading counsel for the United States, as 'an oracle to which present and future times as well may appeal, as furnishing an indisputable evidence of what the law of the world is,' there can be no doubt that the opinion of M. de Courcel and his colleagues will go far to settle several questions, such as the extent of territorial waters, upon which some difference of view has hitherto been possible. The authority of so august a body was hardly needed to negative the proprietary right of a nation in free-swimming creatures which may happen during part of the year to resort to its territory. Many topics with which the arbitrators were not directly concerned were discussed in argument, such as the origin of property, the possibility of acquiring jurisdiction over an open sea by acquiescence, the interpretation of statute-law when in apparent conflict with the Law of Nations, and the whole question of the nature and sources of International law, which Mr. Carter derived mainly from the 'Law of Nature,' while Sir Charles Russell defined it in a way which is open to little objection, except that he would seem to exclude from its scope such positive rules as are morally indifferent. 'International law,' says Sir Charles, 'properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations one to another.' Elsewhere he well remarks that International Law 'has long passed the stage at which an appeal to any vague, general principles can afford any safe, certain resting-place, or guide at all. It is now, and it has long been, a body of derivative principles and concrete rules, formed by the action and reaction upon each other of custom, moral feeling, and convenience.' T. E. H.

There seems no reason why the Sale of Goods Bill should not receive the Royal Assent before the end of the Session, and a third step thus be taken towards the codification of those portions of the law which most affect commercial dealings. Judge Chalmers and the Lord Chancellor may then be congratulated upon having, the former by his draftsmanship, the latter by his advocacy, added to the statute-book a measure which, if it cannot hope for the ready acceptance which has attended the Bills of Exchange Act, is certain powerfully to influence the development, and greatly to facilitate the study, of a most important branch of law. It is easy to say that we ought to begin with the general rather than with the particular, with the principles of Contract rather than with Sale or Partnership; and it is easy to criticize details in the treatment of questions upon which the best brains have been at work for centuries. It is not so easy to select a topic of everyday utility to everyone, to reduce its rules to manageable dimensions, and to defend them as re-stated for five years against all comers.

Since its first introduction into Parliament, in 1888, the Bill has been modified in several respects, not always, perhaps, for the better. The sections relating to the Contract of Exchange have been very properly omitted; but the special law relating to the sale of horses, which was to have been neatly consolidated into a sort of footnote, is now left outstanding; and the symmetry of the whole is not a little impaired by its extension to Scotland. One is inclined to grumble because sect. 2 touches upon the incapacity of infants, which is by no means confined to their purchases. 'Necessaries,' for instance, may just as well be services rendered as goods supplied. One may have misgivings as to the adequacy of the treatment of 'warranty'; one may fail to see why the re-vesting of goods on conviction should come into the Bill at all; and one looks in vain for the enactment now hidden away in the County Courts Act, which provides that no action shall be brought for the price of ale and certain other liquors consumed on the premises. But the only way to make a department of law at once symmetrical and complete is to get it stated in a series of propositions; and from this point of view there would be much to be said in favour of even avowedly tentative codification.

The fortunes of this Act, when it comes into operation, will be watched with much interest, as indicating, in a way which could not be expected from Acts dealing with the comparatively isolated topics of Bills of Exchange and Partnership, the attainability, within a reasonable time, of a Civil Code; which should doubtless include all the topics which on the continent are usually relegated

to a separate Code of Commerce. Codification must come, but, if we are to escape the disadvantages which its critics are not unreasonably given to predicting, it must be carried out systematically, and by means of a larger supply of specially trained ability than has yet been devoted to it. T. E. H.

Searching criticism like that of Lord Macnaghten (*Ward* v. *Duncombe*, '93, A. C. 369) on the rule in *Dearle* v. *Hall* is always valuable, though the rule itself (as distinguished from the grounds of it) is now beyond criticism. Though first formulated by Sir T. Plumer it grew naturally out of the analogous principles of *Ryall* v. *Rowles* (1 Ves. 348), and the practice of conveyancers advising notice to the trustees on assignment of a trust fund—a practice which, as James L.J. said in *Re Ford* and *Hill* (10 Ch. Div. 365, 370), is itself part of the common law. The mistake which Sir T. Plumer made was in laying stress on the negligence of the assignee as postponing him; for negligence is relative, it implies a duty, and an assignee of a trust fund owes no duty to a subsequent assignee. It is a matter of *title, not negligence.* 'The law of England,' as Sir T. Plumer said, 'has always been that personal property passes by delivery of possession,' and giving notice is in the case of a trust fund or other chose in action the only way in which possession can be taken. It is constructive or *quasi* possession. Why the law of England attaches this importance to possession or *quasi* possession is plain. It prevents the assignor dealing with the property as apparent owner, to the detriment of subsequent assignees. This is the element of truth in Sir T. Plumer's theory of negligence or constructive fraud, it is the principle of *Ryall* v. *Rowles*, and a perfectly sound one. Once given the notice is good for always. Any other view would lead, as Lord Macnaghten said, to an unseemly 'scramble for priorities' on the appointment of new trustees.

An over-zealous servant is a danger to his employers, especially when as in the case of a railway porter his duties are multifarious and undefined. Not long ago a railway company was contesting the authority of its porter to take charge of a passenger's luggage for ten minutes while the passenger went to get his ticket (*Bunch* v. *Great Western Railway*, 13 App. Cas. 31). Now we have a railway company disputing a porter's authority to remove a passenger from a carriage for just cause (*Lowe* v. *Great Northern Railway Co.*, 62 L. J., Q. B. 524). Unfortunately for the company in this case, there was no just cause. The porter, with the best intentions of doing his duty, had bundled a passenger out of a carriage, under an erroneous impression that he was a pitman and ought to be travelling in

a carriage specially appropriated to such persons. Railway companies would not be railway companies if they did not contest, reasonably or unreasonably, every liability with which they are sought to be fixed: but it would be highly inconvenient if a porter had not such a power of removal where a passenger is misconducting himself. Whether railway companies like it or not, the necessities of the public become the measure of the implied authority in such cases.

It is satisfactory to find that infants are not to have things all their own way. A pseudo-infant of twenty years and nine months who executes a marriage settlement knows quite well what he is about, and when he pleads incapacity the plea is a bare technicality, which the Court, taking judicial notice of the precocity of the modern infant, regards with small sympathy. It answers like Portia,

'He shall have merely justice and his bond.'

What the unconscionable infant in *Edwards* v. *Carter* ('93, A. C. 360) wanted was to keep his privilege of disaffirming his settlement in suspense until he saw how it was going to affect after-acquired property within the settlement when it fell into possession. This extravagant claim the Court made short work of. 'Solvuntur risu tabulae,' indeed it is difficult to see what relation such deferred election bears to the disability of infancy at all. Not much better was the contention in *Harris* v. *Beauchamp Brothers* (42 W. R. 37) that judgment could not be given against a firm with an infant partner. If this immunity were allowed every firm would keep an infant partner on the premises.

The story of the Howe Peerage (*Willis* v. *Earl Howe*, '93, 2 Ch. (C. A.) 545) 'staled by frequence,' has lost whatever elements of romance it once possessed, and serves now only to point a dry legal moral. Palming off a supposititious baby as heir to an estate (to suppose for a moment the story true) is certainly fraud, but fraud alone will not prevent the Statute (3 & 4 Will. 4, c. 27) running, because fraud may by diligence be discovered. It is only when fraud is concealed, and therefore incapable of detection, that the Statute does not run, for the very good reason that laches in such a case cannot be imputed. The mere taking possession of the estate on behalf of the infant (as in the Howe case) does not render the fraud incapable of detection. On the contrary it challenges inquiry. It was splendid audacity in the plaintiff to pose as the discoverer of a fraud, after novelist, newspaper and solicitor had all had their turn at the situation for a century. In fact *Willis* v. *Earl Howe*

sums up in itself all the elements which make up the policy of Statutes of Limitation: laches, the quieting of titles and 'finis litium.'

'The question for decision' when 'reduced to its simplest form, may be thus stated: Suppose an owner of deeds has placed them under the control of another, and has authorized him to pledge them for a certain sum, and suppose that he has pledged them for more with a person dealing with him *bonâ fide* and without notice of the limit of his authority, can the owner of those deeds redeem them without paying the full amount advanced upon them? The answer to this question is No.' (*Brocklesby* v. *Temperance Permanent Building Society*, '93, 3 Ch. (C. A.) 130, 140, judgment of Lindley L.J.) These words exactly sum up the point and effect of a case which to most readers must seem complicated. The complication, such as it is, arises from the intricacy of the mercantile transactions the effect whereof had to be considered by the Courts. But when once this is ascertained the principle applicable to the case is both obvious and well established. It is simply this: that a principal is bound to third parties by any act on the part of his agent which from the principal's own conduct a third party has a right to believe is within the authority of the agent, and this principle again which, if once clearly grasped, solves almost all the problems of the law of agency, is merely an application of the fundamental rule or axiom which governs the whole law of contract, viz. that a promisor is bound not by the promise which he means to make, but by the promise which by his conduct he has led the promisee to believe that the promisor means to make. It is always, in short, the apparent, not necessarily the real intention of a promisor by which he is bound. The law looks, as regards intention, and most wisely, to the natural result of a man's acts and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable ground for supposing that he does intend.

'The main question in this case' (*Wheaton* v. *Maple & Co.* '93, 3 Ch. (C. A.) 48) 'is whether the plaintiff, who has actually enjoyed the access and use of light to his dwelling house for the full period of twenty years without interruption before action brought over lands contiguous to his house—in this case in reality for forty years, for his house was built in 1852—is entitled to restrain certain lessees of the Crown from building upon such lands so as to obstruct his lights.' (Judgment of A. L. Smith L.J., p. 69.) The Court of Appeal has answered this question in the negative.

The answer rests on the simple ground that the plaintiff's right (if any) to lights arises under the Prescription Act, 1832 (2 & 3 Will. IV. c. 71), s. 3, but that section 3 does not bind the Crown, and the plaintiff therefore has no rights whatever. The decision is good law, but it results in very scant justice. There is certainly not a layman living who on reading the 3rd section of the Prescription Act, 1832, would not suppose, as the plaintiff in *Wheaton* v. *Maple* did suppose, that the plaintiff had acquired an 'absolute and indefeasible' right to light. This idea would no doubt have been erroneous, but it is no small evil that a law on which ordinary men have constantly to act should apparently mean one thing whilst it really means another. The time surely has come when the whole law of prescription may be reduced to a simple and intelligible form which might be understood by a layman of intelligence no less than by a lawyer.

No branch of English law is, as has been constantly remarked in these pages, so unsatisfactory as that portion of it which is created by judicial interpretation of Statutes. Take for example *Hill* v. *Thomas*, '93, 2 Q. B. (C. A.) 333. It is a decision on the meaning of the words 'extraordinary traffic' used in the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23. To any one who studies the case two points become apparent. The first is that neither judges nor magistrates have hitherto been able to make up their minds as to the true meaning of the words we have cited, and very possibly for the best of all reasons, namely, that the draftsman who drew and the legislature which passed the enactment in question attached no definite sense to a very vague expression. The second point is that even now the interpretation affixed by the Court of Appeal after great deliberation on the words 'extraordinary traffic' may cause a good deal of perplexity to magistrates and others engaged in the practical administration of the Highways, &c. Act, 1878. It seems to mean any traffic which is beyond the ordinary traffic over a given road. But, on the other hand, if the amount of traffic is not as a whole extraordinary, the use of the road by one person, say to tenfold the amount of its use by all other persons, does not constitute extraordinary traffic. From which it would seem to result that the habitual use of a road by one person can never in the long run constitute extraordinary traffic. For his user of it forms by degrees the measure of the ordinary or average traffic over a particular road.

N obtains furniture from *A* on the purchase and hire system. *N* while the instalments on the furniture are still unpaid, and

in violation of the agreement with *A*, sells the furniture to *X*, who buys it in good faith without any knowledge of *A*'s rights. *X* has a good title to the furniture against *A*. This is the point decided in *Lee* v. *Butler*, '93, 2 Q. B. (C. A.) 318. 'This,' says Lord Esher, 'is a very plain case, and the construction of the Statute is very clear.' The truth of this assertion is in one sense indisputable. The case falls precisely within the very words of the Factors Act, 1889, s. 9. *N* has 'agreed to buy goods' and 'obtains, with the consent of the seller [*A*], possession of the goods.' There is then 'delivery' by *N* 'of the goods' under a sale to *X*, who is a 'person receiving the same in good faith, and without notice of any lien or other right of the original seller' *A*. It follows then that *X* has under the Act a valid title. Compare the Factors Act, 1889, ss. 2 and 9. But though the words of the enactment are amply satisfied, many persons will feel that its spirit is violated. One thing is pretty clear. If the judgments of the Queen's Bench Division and of the Court of Appeal be, as they probably are, good law, either the Factors Act, 1889, must be amended, or the purchase and hire system must be given up or modified.

It is a dangerous thing to receive as a present fully paid up shares in a company formed under the Companies Act, 1862, when in fact nothing has been paid for them; the gift, should the company fail, will impose on the donee the necessity of paying up the full price of his shares. This is the moral of *In re Eddystone Marine Insurance Co.*, '93, 3 Ch. (C. A.) 9. It is an important one to all men engaged in business. Everyone must sympathise with the judges in regretting that quite respectable men who have acted with perfect honesty should suffer loss from receiving a well deserved present. But anyone who looks to the interest of the public and to the necessity of maintaining mercantile honesty must be glad that the principles of the Companies Act, 1862, should be rigidly enforced. Mercantile associations should not give presents.

What is a criminal proceeding? This is an inquiry to which it is not easy to obtain a clear and decisive answer. *Rayson* v. *South London Tramways Co.*, '93, 2 Q. B. (C. A.) 304, decides that a summons taken out against a passenger in a tram-car for having committed the offence under the Tramways Act, 1870, 33 & 34 Vict. c. 78, of avoiding, or attempting to avoid, payment of his fare is a criminal proceeding, and, if taken without reasonable and probable cause, will support an action for malicious prosecution. The character, in short, of the proceedings is not affected by the

fact that their object is to obtain payment of a penalty. The test by which to determine whether a proceeding is a criminal proceeding appears to be the character of the act in respect of which the proceeding is taken. If the offence complained of is in itself a misdemeanour then proceedings for a penalty are criminal proceedings, i.e. proceedings intended to punish a crime.

Bankers and business men will have to reconstruct their ideas a little after *Powell* v. *London and Provincial Bank* ('93, 2 Ch. (C. A.) 555). The practice of pledging certificates with blank transfers to secure an advance has become universal in the mercantile world. Convenience is all in its favour. The security may never want enforcing, but if it does, all the pledgee has to do is to fill up the transfer and get it registered. One little thing, however, in this transaction has been in danger of being forgotten—was in fact forgotten in *Powell* v. *London and Provincial Bank*—and that is that for the transfer to operate as a deed, it must be re-delivered by the pledgor after being filled up, delivery not being as yet an obsolete formality. It would soon become so if the Court had yielded to the argument addressed to it to presume 'omnia rite acta' in plain contempt of facts. Of course the pledge is good, in equity, apart from any deed, as an agreement to give a charge, but in a commercial shipwreck there is nothing for an incumbrancer like having a plank in the shape of the legal title to cling to.

The Court of Appeal had a very good opportunity in *Re Washington Diamond Mining Co.* ('93, 3 Ch. (C.A.) 95) of 'sticking in the bark' in construing the fraudulent preference section of the Companies Act, 1862. The difficulty arose from the mischievous practice, now so common among parliamentary draftsmen, of incorporating by reference the law of one subject into another, in the particular instance the bankruptcy law of fraudulent preference into winding up. They save themselves trouble and call it assimilating the law. If the analogy is perfect no harm is done, but the analogy seldom is perfect. It is certainly not so in the case of bankruptcy and winding up. There is in winding up a well settled rule that a contributory of a limited company cannot set off a debt against calls—a corollary from the fundamental principle (the price of the privilege of limited liability) that the capital must be paid up in full in cash. There is nothing like this in bankruptcy. Hence the Court of Appeal had to torture the section to make it fit the requirements of company law. It was well they could, for this impeached transaction is far too common. Directors, that is to say, vote fees to themselves when the ship is sinking, and set off the sum against liability on their shares.

Lunacy plus pauperism is the most abject state to which humanity can be reduced. Beside it a creditor not getting paid his debt is a very petty grievance. The Court had long ago to weigh these two evils in the scales of justice, to determine whether a helpless lunatic was to be stripped by his creditors or to be maintained, *durante vitâ*, at their expense, and it held that the stronger claim lay with the lunatic. The creditor in such a case is not denied justice. He is merely delayed till the lunatic's death. The only point in *Re Plenderleith* ('93, 3 Ch. (C. A. 332)) was whether the fact that the creditor had got a charging order made any difference. The Court had no difficulty in holding it did not. To allow such a thing would nullify the beneficent jurisdiction of the Court, for every creditor would get one.

The Court of Chancery has incurred a great deal of popular odium and obloquy 'traduced by ignorant tongues' but whatever be its sins and shortcomings its protecting care of lunatics and infants, not to speak of unprotected women, will always redound to its honour.

Somerset v. *Poulett* (62 L. J. Ch. 720) is stuffed full of morals, morals for trustees, for tenants for life, for surveyors, for solicitors. By the way, why is this case, which Kekewich J. described as 'the most difficult and most important of pure Chancery cases' which had ever come before him, not in the Law Reports? It was the old story of the importunate tenant for life and the good-natured trustee—the tenant for life wanting to improve his income and the trustees relying on the advice of others instead of using their own judgment. The case illustrates more especially the remedial operation of the Trustee Act 1888 (now the Trustee Act 1893). Instead of the security being thrown back on the trustees, it is now allowed to stand for the proper amount, but even this alleviation left the trustees liable for an over advance of nearly £10,000. Tenants for life will tremble when they read of Kekewich J. impounding the life interest of the tenant for life under sect. 6 of the Act to assist in recouping the trustees, but this severity the Court of Appeal abated, holding that the breach of trust in the section must be an act which is itself a breach of trust, not one which becomes so by reason of the want of care on the part of the trustees (28 L. J. 783). It is just as well, however, that tenants for life should know the risk they run in beguiling trustees to their ruin.

The law certainly wants popularizing. Foreigners may be forgiven for thinking that an Englishman sells his wife at Smithfield seeing there are records of Black Country savages having claimed

to exercise some such supposed common law right. But in *Whitworth* v. *Whitworth* (62 L. J., P. D. & A. 71) we have a husband, a not illiterate person, signing a paper providing that the parties should live separate and that each might marry again (which they proceeded to do) and actually believing bona fide that he might do so. A hardly less crude matrimonial fallacy (*Chudley* v. *Chudley*, 69 L. T. R. 348) is that a husband cannot desert his wife if they are temporarily parted. This, to use an old judge's expression, is 'worse than false. It is a heresy.' The reciprocal duties and obligations arising out of marriage are many and complex. Cohabitation is one, but it is only one. It may be dispensed with for a time by the consent of both parties, as when a husband goes to look for work in the Colonies, or a wife goes to her mother for her confinement (*Chudley* v. *Chudley*), but the suspension of one of the obligations of the spouses does not affect the rest. The husband is still bound to maintain his wife, he is still the guardian of his children, and these duties he cannot by any absence abdicate.

Reichardt v. *Sapte*, '93, 2 Q. B. 308, raises a curious question which it does not decide. Suppose that *A* and *B* each compose a play without any communication with each other, and without any knowledge of each other's work. Suppose, further, that the two plays are substantially alike. Have *A* and *B* each a right to the exclusive representation of his own play? Mr. Justice Hawkins is clearly inclined to answer this question in the affirmative. It is clear, we may add, that this extraordinary coincidence between *A*'s drama and *B*'s drama can in practice only arise when *A* and *B* have each stolen their ideas from some more original writer, probably from a French playwright. In point of justice and common sense there is certainly no reason why under these circumstances the rights of each party should not be precisely equal. Indeed there might be a good deal to be said in favour of a law which refused every kind of privilege to the author of a drama which is a mere adaptation of a foreign piece.

A decision such as *In the Goods of Marchant*, '93, P. 254, shows that the formalities apparently required by the Wills Act, 1837, may to a considerable extent be evaded. A testator may execute a short document bequeathing to *A* all his property for the purposes mentioned in another unexecuted document. The document need not be distinctly referred to or designated in the will. It does not in fact form part of the will. Yet whoever takes out probate of the will, will be compelled to carry out the trusts described

in the unexecuted document. In other words, effect is given to a will which is not properly executed.

The December Law Reports are good reading, but owing to their bulk we can only notice a few of the more interesting cases.

The rule that an executor may pay a Statute-barred debt at any time before decree is one of the time-honoured anomalies of our English law. No one, as Cotton L.J. said in *Re Rownson* (29 Ch. Div. 358), quite knows the origin of it, but it was probably due to a feeling that it was unconscionable to set up the Statute. But an executor has nothing to do with these expensive feelings. His duty is to protect the estate and pay only enforceable claims, and if he chooses against the wishes of his co-executor to pay a debt which has been judicially declared statute-barred he must take the consequences of a devastavit (*Midgley* v. *Midgley*, '93, 3 Ch. (C. A.) 282). There was no martyr's crown either for the executor in *Midgley* v. *M.*, for he had paid the debt only with a reverted eye to his own interest. Solicitors whose zeal outruns their discretion will also find a warning in this case.

To have towers, wings, and a vestibule to your mansion-house as well as first-class stabling, is a perfectly legitimate ambition. Bacon thought you could not have a 'perfect palace' without them: only they are the sort of fancies a man must pay for out of his own pocket, not out of capital moneys under the Settled Land Acts. (*Re Lord Gerard's Settled Estate*, '93, 3 Ch. C. A. 252.) These Acts make no provision for 'beautifying an ugly house.' The improvements on which they sanction expenditure are severely, not to say basely, utilitarian, such as drains, roads and saw-mills. True such improvements as stables, bath-rooms or billiard-rooms might be sanctioned under the Settled Land Act, 1890, if they were necessary for the letting of the mansion-house, but this again is business, not aestheticism.

It is a nice point of legal casuistry, that raised by *Bernstein* v. *Bernstein* ('93, P. (C. A.) 292). A husband knows of his wife's adultery with *A* and condones it: but he does not know at the time he does so that she has also committed adultery with *B*, *C*, and *D*. Is the condonation—so far as *A* is concerned—good? The Court of Appeal say yes, which is the more generous construction and also the truer. Condonation is not a *restitutio in integrum*, but it is a blotting out for good of the condoned offence. If it were conditional, subject to reservation and retractation, it would soon come

to mean nothing.' As it is, it often saves wedlock from the misery and scandal of the Divorce Court.

In speaking of Earl-Bishop Odo, the first of our English Justiciars, Lord Campbell says, 'in the former capacity he left behind him a natural son,' &c. The solicitor ('93, 2 Q. B. (C. A.) 439) who let his houses at Bristol as brothels, sought to draw a somewhat similar distinction between his character of solicitor and of landlord. Why should he be struck off the Rolls for an offence committed as a landlord? It was ingenious but ineffectual. The distinction of *personae* is important in jurisprudence, but in the domain of morals or conduct this Jekyll-Hyde theory is too metaphysical. How are we to know that the person in the ascendant is a fit and proper person to be on the Roll?

When a husband makes his wife a present of jewellery within two years before his bankruptcy, this is a voluntary settlement within the meaning of sect. 47 of the Bankruptcy Act, 1883. So *Re Vansittart*, '93, 1 Q. B. 181 (No. 1) decided. But what if the wife has pawned the jewellery in the meantime? Is the pawnbroker to be simply wiped out by the trustee in bankruptcy; as he must be if the section is to be read strictly as making the settlement 'void?' To satisfy the fitness of things, Vaughan Williams J., in *Re Vansittart* (No. 2) 193, 2 Q. B., 377, and *Re Brall*, '93, 2 Q. B. 381, construes 'void' as 'voidable,' and reads into the section a saving clause in favour of a bona fide purchaser for value. Acts of Parliament have to be rationalized in this sort of way.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE GERMAN CODE OF CRIMINAL PROCEDURE.

THE year 1877 is famous in the annals of German legislation, for in this year were passed what are known as the Laws of Justice (*Justiz-gesetze*); that is to say, the Code of Judicial Organization, the Code of Civil Procedure, the Code of Criminal Procedure, and the Bankruptcy Code.

The Code of Criminal Procedure was passed on February 1, 1877, and came into force on October 1, 1879. Some of the principal features of the German judicial system have their origin in the primitive customs and procedure in force among the ancient Germans. It is not necessary to notice these at any length; their history has been very similar among all races of Teuton origin.

The original principle which ruled penality was private vengeance, exercised by the victim or his relatives (*faida*, *fehde*). A few acts of a specially grave or shameful nature were regarded as a direct attack on the public safety or national honour, and were visited with public punishment[1]; but the majority of crimes merely gave rise to individual reprisals. As the unrestricted right of vengeance would have caused a state of perpetual warfare, as harmful to the peace of families as to the interests of the State, the criminal was allowed to escape the terrible consequences of his crime by paying to his adversary a money payment or composition (*Wehrgeld*). This transaction was sanctioned by the public authority, which received a sum of money (*Fredum*, *friedensgeld*) as the price of its intervention. Gradually it came to be perceived that the crime harmed interests higher than those of the particular persons injured, and private vengeance gave way to a system of public punishment.

Early justice used to be administered with the aid of assessors (*Scabins*, *Scabini*, *Schöffen*), who heard orally the testimony of persons having knowledge of the offence. If proof was not complete, but there were grave presumptions of guilt, the Rachimbourgs or Scabins could order the accused to purge himself of the accusation, either by the purgatorial oath, or ordeal, or challenging his adversary to single combat. In the first case, the accused affirmed on oath that he had not committed the act imputed, and produced, in support of his affirmation, a certain number of

[1] See Tacitus, *De moribus Germanorum*, c. xii.

honourable men [1], who spoke to his good reputation, and declared him incapable of perjuring himself. If he could not produce the requisite number of men, it only remained for him to submit himself to some ordeal or to claim the judicial combat. Torture was commonly resorted to in order to compel a confession of guilt. It was strictly permissible only in the case of slaves; but as a matter of fact it was resorted to against freemen also. The system of jurors or assessors continued to the middle ages. Each court was composed of a judge (*Richter*) and of persons (*Urtheiler*) whose duty it was to appreciate the facts and *find* the judgment. In the ordinary courts the duty of deciding the question of culpability was confided to all the freemen present at the hearing or to a limited number of hereditary or elective assessors (*Schöffen*). When the number was limited, it was generally seven, and sometimes twelve [2]. At first prosecutions were left to be instituted by the victim or a member of his family. Subsequently the assessors were charged with bringing offences to justice. The guilt or innocence of the accused was determined by a majority of voices.

Penal procedure in the middle ages was marked by the following features: the necessity of an accusation to put the judicial machinery in motion, the absence of any preliminary inquiry, the evidence at the hearing of the parties, the oral and public nature of the proceedings, and the division of judicial functions between the assessors and the judge. The following innovations were introduced by the Roman and canon laws: the public prosecutor, written interrogatories, the establishment of the offence by means of a record of inquiry, secret inquiry, legal proofs, and judgment on written documents. The judge had merely to collect the documents furnished by the preliminary inquiry and gave his judgment on a perusal of the record. The confession of the accused was regarded as the best proof (*regina probationum*), and in order to get this, recourse was had to torture. The Ordinance of Bamberg required a confession even when the offence was proved by the depositions of witnesses, and in order to obtain such confession, prescribed the employment of torture; the Ordinance of Charles V [3] was more humane, and declared that if the accused,

[1] These men were called *conjuratores, sacramentales*. The excellence of the original jury system in England was that the jurors were men of the locality who knew the facts and the parties.

[2] Details are to be found in a number of medieval collections or books of law (*Rechtsbücher*), of which the most famous are known as the Sachsenspiegel and the Schwabenspiegel. They are both private works, with no legislative authority, intended by their authors to fix the rules consecrated by custom. They owed their success to their intrinsic value.

[3] These two celebrated Ordinances opened a new era in the history of German criminal law. Their influence, succeeding to that which had been formerly exer-

after sufficient proofs of his guilt, was unwilling to confess, it was to be explained to him that the judge had made up his mind, and it was therefore useless for him to deny; if he persisted in his denial, the punishment provided by law might be inflicted on him, without subjecting him to torture. At the time the Ordinance of Charles was promulgated, the Criminal Court was still composed of a magistrate assisted by assessors; but even this Ordinance enjoined recourse, in doubtful cases, to the opinion of men learned in the law. Starting from the seventeenth century the system of assessors fell more and more into disuse, and by the end of the eighteenth and commencement of the nineteenth century the judicial charges were almost entirely in the hands of jurisconsults, and the representatives of the non-judicial element were systematically removed; only here and there assessors were retained, principally as special courts for trying forest and rural offences.

The exact practical results of the change of procedure which came about in the seventeenth century may be seen in the treatise of the famous jurist Carpzow (1635), under the title of *Practica nova imperialis Saxonica rerum criminalium*. He recognizes the right of private persons to institute the penal action, but states that from his time public prosecutions are far more frequent. The procedure, according to him, was divided into two parts: the *inquisitio generalis*, including all the preliminary investigations made with a view to establish the existence of the offence, and fix the presumption on a particular person; and the *inquisitio specialis*, that is, the charge in regular form against the presumed author of the punishable act. This commenced with the examination of the accused, who was called upon to answer the different heads of the accusation; then followed the production of the full charges, the hearing of witnesses, and the judgment. The judge could base his decision on the *evidentia facti*, resulting from the *flagrans delictum*, or the combination of certain proofs, on the confession of the accused, or on the *convictio rei*, which was arrived at on the concurrent testimony of two respectable witnesses. However strong the proofs were, they did not suffice for condemnation, but if they were conclusive, they justified the employment of torture. If the proofs were considered insufficient to justify the application of torture, but there nevertheless existed strong presumptions, the accused was invited to take the purgatory oath. These rules became the common law

cised by the Mirrors of Saxony and Suabia, extended to the whole of Germany, and lasted up to modern times. The Ordinance of Bamberg was drawn up in 1507, and served as a basis for the great criminal Ordinance of Charles V. and of the Holy Roman Empire, generally known by the name of *Constitutio Criminalis Carolina*, which was promulgated as a law of the Empire in 1532.

of Germany, but they afterwards underwent some modifications; the procedure being divided into three parts, the information, the preliminary inquiry (*untersuchung*), and the special trial (*spezial inquisition*). The adoption of the inquisitorial system rendered the procedure written and secret, and led to the theory of legal proofs and the frequent employment of torture; the proofs had henceforward a sort of mathematical value determined by the law; the judgment was passed on the record, without oral debate and without publicity. Not only doctrine and practice, but positive legislation also contributed to hasten this transformation.

But during the course of the eighteenth century, German jurists returned to diametrically opposite opinions; after having borrowed the ideas of the Roman and canon laws, they repudiated them as a foreign importation, and sought to renew the chain of the traditions of ancient German law. The Protestant Universities seconded them in this task, and combated with the greatest energy the law which had issued from the practices of the Church; while the philosophers lent them the aid of their talent and their authority, and united with them to suppress in the name of humanity and justice a procedure which enormously favoured the prosecution at the expense of the accused, and which often left to an innocent person no means of defence. The first victory of these efforts was the abolition of torture. It was some time, however, before this reform became general. By an order of the Cabinet of June 3, 1740, the Prussian Government had restricted the employment of torture to the crimes of treason and to grave cases of assassination; the Courts, on their side, showed such an ever-increasing repugnance to recur to it, that it ceased to be used at the close of the eighteenth century, though it was only formally abolished by the Code of 1805. Austria had preceded Prussia in this matter, Maria Theresa having, on June 2, 1776, forbidden the application of torture to accused persons. An analogous step had been taken at Baden in 1767, and the example had been followed by Mecklenburg in 1769, and by Saxony in 1770. On the other hand, torture was retained in Bavaria and Würtemberg up to 1806, in the Duchy of Weimar up to 1817, in Hanover up to 1822, and in the Duchy of Gotha up to 1828.

The principles of the German common law again asserted themselves in the Austrian Penal Code of 1803, the Prussian Criminal Code of 1805, and the Bavarian Penal Code of 1813. But traces of the Roman influence remained. The Prussian Code retained the official prosecution and the secret inquiry. The project of the Bavarian Code had been prepared by the illustrious jurist Paul Anselm de Feuerbach; by this the procedure remained inquisitorial

and secret, but the accused was allowed a defender[1] in heinous cases. Feuerbach had wished to make the trial public, but could not make his opinion prevail. When the proof was insufficient, but the presumption of guilt was not rebutted, the judge simply pronounced a provisional discharge (*entbindung von der instanz—absolutio ab instantia*), that is, the accused was liable to be retried, if further proof were forthcoming, and meanwhile he would be placed under police surveillance. Many other States followed the principles of the above codes; the dangers of the secret procedure were acknowledged, and common sense revolted against the absurdity of so-called legal proofs, which often forced the judge to condemn against his own conviction. The legislation, which was the issue of the French Revolution, had inaugurated a system of procedure more consonant with the dictates of reason and equity. This system, founded on the separation of the functions of judge and accuser, on the orality and publicity of the trial, on the substitution of conscientious conviction for legal evidence, and on the institution of the jury for the trial of grave offences, would have speedily spread itself over the whole of Europe, but the hatreds aroused by the wars of the Republic and the Empire and the fear of favouring French influence retarded its introduction into Germany. Only the countries on the left bank of the Rhine enjoyed the benefits of the new system early, thanks to the French Code of Criminal Procedure of 1808, which was extended to them.

The first Code in which a tendency to approach French ideas is manifested, is the Würtemberg Code of June 22, 1843, which, though it retained the secret procedure, required that the judgment should be preceded by a public trial in all heinous cases. This tendency is more strongly marked in the Bavarian Code of March 6, 1845, and is due to the works of the jurist Mittermaier. The procedure is divided into two parts, the preliminary inquiry, which continues to remain secret, and the trial, which becomes oral and public, and which takes a preponderating place. The theory of legal evidence is done away with, but trial by jury is not admitted. A good many States, however, adhered to the common law. Then came the Revolution of 1848, which exercised a decisive influence on German criminal procedure. The Assembly of Frankfort declared the inviolability of the person and the domicile, the secrecy of private correspondence, the orality and publicity of criminal trials; press offences were to be tried by jury; no one could be withdrawn from the jurisdiction of the ordinary courts, and exceptional tribunals were forbidden. A majority of States revised

[1] All the defender could do was to draw up a written defence.

their laws of criminal procedure in accordance with these principles; for instance, Prussia by an Ordinance of January 3, 1849, Austria by the Code of January 17, 1850, and Bavaria by the Law of November 10, 1848.

But a reaction speedily set in, resulting in the enactment of some manifestly retrograde laws. For instance, in Austria, the Code of 1850 was replaced by the Code of July 29, 1853, which restricted the publicity of the trial, and returned in some respects to the system of legal evidence, by determining the minimum of evidence necessary for a conviction. Henceforward, two opposing tendencies were seen both in doctrine and legislation, the one favourable to French ideas and the changes made since 1848, the other favouring a return to the former procedure. However, the old state of things had received a definite condemnation, and liberal theories, after undergoing divers vicissitudes, finally triumphed almost universally. While the Code of 1877 had to suppress many local divergencies, it took as its basis those principles which were admitted in the large majority of States; namely, a private accuser, oral and public trial, and the admission of the non-judicial element, a jury for crimes, and assessors for smaller offences. One may say, then, that the Code of 1877 only consecrated juridical rules already in force in the greater part of the empire.

To sum up, criminal procedure in Germany, as in most European continental States, has undergone three successive phases. At first, it is purely *accusatory*: that is, a complaint by the victim or his relatives is necessary. The Court is composed of all the freemen of the tribe, or of a certain number of delegates, and the trial is public. The accused establishes his innocence by getting his relatives or friends to solemnly confirm his declarations, or by the judicial duel or by ordeals. At the end of the middle ages, and under the influence of the Roman law and of the canon law, the procedure becomes *inquisitorial*. The judge takes cognizance *ex officio* on a charge, on a private complaint, or simply on his own suspicion. The inquiry and examination of the accused are secret, and everything is committed to writing. The proof consists of the confession or the depositions of witnesses; the confession especially is regarded as of the last importance, and in order to extort it from the accused, resort is had to violence. The law lays down in what circumstances the judge must hold the guilt to be proved. Judgment is delivered on the written record, without any open trial, arguments, or publicity. Then came what may be called a mixed procedure. Under this new system the starting-point of every criminal trial is a prosecution generally set in motion by a special functionary, representing society. The preliminary inquiry is conducted with

closed doors, but the trial is public. The theory of legal evidence is finally abandoned, torture is abolished, and the judge, in the exercise of his duties, has only to act on his conscience.

The Code of Criminal Procedure.

Article 4, clause 13 of the Constitution of the Confederation of Northern Germany mentions penal law and procedure among those subjects in which it was desirable to have uniform laws for all the Confederated States. The Penal Code was promulgated on May 31, 1870, but the varying judicial organizations of the different States put obstacles in the way of passing a Criminal Procedure Code, which, with the Code of Civil Procedure, had to go hand in hand with the Code of Judicial Organization.

It will be convenient to give an outline of the principles of penal procedure which have been embodied in the Code, before proceeding to discuss its provisions in more detail.

Cognizance of Offences and Initiation of Proceedings.

The Code reserves to the representatives of the social power an almost absolute monopoly of accusation. It is only as an exception that the victim is allowed to cite the author of the wrong before the Criminal Court, and this power is accorded only in the case of defamation, slight bodily hurt, or hurt caused by rashness or negligence (art. 414); with the exception of these few cases, he can only go to the Civil Court for damages, or move the Prosecution Department to institute the public action. In order to obviate any danger or inconvenience which might arise from the want of independence or the political opinions of the Public Prosecutor, the party aggrieved can, in the case of refusal, apply to the Prosecutor's Departmental Superior, and if the application be rejected, he can appeal to the Superior District Court or to the Court of the Empire, which can direct proceedings to be taken against the accused. There is, however, one restriction on the initiative of the Prosecution Department, and that is that certain offences (*antragsdelikte*), which are considered to harm private interests principally, or to attack the honour of persons or families, can only be prosecuted on the complaint of the person aggrieved or his legal representatives. The penal action and civil action have no common bond. The power given in France to the injured person to make himself a civil party in the criminal court, is not admitted at all. All claims for damages, based on a crime, a delict or a contravention, must be made in the civil courts. Each jurisdiction thus preserves its independence and its distinct attribute.

Although private persons have only in exceptional cases the right to institute a prosecution in the criminal court, they are often permitted to join in the case, when it has been taken up by the Public Prosecutor. Such intervention is permitted both to those who have the right of private action, and also to complainants who, on the refusal of the Prosecution Department to act, have obtained from the Court an order for inquiry, provided that the offence has been directed against their life, health, civil status, or property (art. 435). It has been considered with reason that the Public Prosecutor, forced to proceed against his will, would not display sufficient zeal, and the intervention of the complainant is permitted to supplement this insufficiency, and prevent any collusion. Moreover, the party aggrieved can join in the public prosecution when the law accords to him the right of claiming a pecuniary compensation (*Busse*).

When once the inquiry has been started, the Public Prosecutor is not permitted to abandon the accusation. He can of course, if the proceedings appear to him to be ill-founded, advise the withdrawal of the prosecution, but it is no longer in his power to stop the penal proceedings (art. 154); whereas the private accuser can withdraw at any moment before judgment is pronounced, and thereby put an end to the prosecution (art. 431).

The Criminal Courts, then, take cognizance of offences either at the instance of the private complainant or of the Public Prosecutor. The charge must be laid in the Village Court, if the offence is within its jurisdiction; otherwise, in the District Court. The first duty of the Court is to see if it is competent, and if not, it sends the record to the proper Court. When the question of jurisdiction has been decided, the Court either proceeds at once to the trial, or, if it thinks necessary, directs a preliminary investigation. No such investigation takes place in cases which are within the competence of the *Village* Courts of assessors; but it is compulsory in cases which must go to the Courts of Assize or the Court of the Empire. As regards offences triable by the District Courts, a judicial inquiry can be ordered at the instance of the Public Prosecutor or on the demand of the accused when based on good grounds (art. 176). For the rest, the Court can always, of its own motion, direct an investigation or a search for certain special evidence. The object of the investigation is to place the Court in a position to see if there are sufficient grounds for continuing the prosecution. The magistrate in charge of the investigation must be equally solicitous in ascertaining facts in favour of the suspected person as in getting evidence of the offence. Thus the accused has a full opportunity of clearing himself, and so of avoiding a public trial.

With a view to ensure the impartiality of the magistrate in the preliminary investigation, its publicity and orality is permitted to a certain extent; the accuser and accused are confronted, and make remarks on the charges, the evidence, and the statements of the witnesses. M. Daguin observes that such a system has many drawbacks: 'Under the pretext of safeguarding the rights of the defence, it disregards the interests of society in having the criminal brought to justice. A moment's reflection is sufficient to show how important it is to proceed at first in secret and without noise, if one wishes to reach the author of a crime, to get at his accomplices or seize the proofs of the offence; to act openly in the light of day is to give a warning to the criminal and his accomplices, to facilitate their flight, and allow them to cause evidence of the offence to disappear. The hearing of witnesses in the presence of the accused and his defender is no less injurious to the discovery of the truth; for even supposing that the witnesses are not disconcerted and confused by the insidious questions of the defender, it is impossible to deny that the presence of the individual against whom they have to depose must be for many of them a cause of intimidation, and must detract from the sincerity of their statements.' The investigating magistrate is given very full powers; he can question the suspected persons, arrest or detain them, visit the spot, make domiciliary visits and seizures, hear witnesses, or direct expert operations. It was considered that the best way of preventing any abuse of these powers was to allow the accused the assistance of a defender capable of explaining his rights to him, and putting him on his guard against any snares laid for him, and art. 137 of the Code allows the accused to employ a defender from the commencement of the investigation; it even permits the investigating officer to appoint a defender, if the accused fails to choose one himself (art. 142). However, the defender, during the preliminary procedure, has only a very subordinate part to play; that is, he is confined to helping his client with his advice, and can neither assist in his examination nor in that of the witnesses. The Public Prosecutor is equally excluded from these operations. The defender can be present when places are visited, and can inform himself regarding the examination of the accused, the reports of experts, and the contents of the record generally; but he is not ordinarily, like the Public Prosecutor, allowed to inspect the record. When the accused is under detention pending trial, he is permitted to communicate with his defender either orally or by writing; but any written notes exchanged must be submitted to the investigating magistrate, and an official of the judicial service must be present at the

interviews. This last restriction on free communication is dispensed with, when the under-trial detention has been ordered only owing to the fear that the accused may take flight [1].

Preventive Detention.

Although the accused is considered as innocent until he is actually convicted, the necessity of securing his person, either to prevent his absconding, or to prevent his tampering with the witnesses, is admitted. But the rigours of such detention must be softened as much as possible. To justify preventive detention, the German Code requires the existence of grave presumptions against the accused, and a reasonable belief either that he may take flight or that he may abuse his liberty in order to cause evidence of the offence to disappear or to threaten or persuade the witnesses to make false statements. The law conclusively presumes an intention to abscond, when the act charged is a crime, when the accused is living in a state of vagabondage, without fixed domicile or unable to justify his identity, or when he has his domicile abroad and there is reason to believe that he will refuse to obey process (art. 112). If the offence is less serious, and punishable only with simple imprisonment or fine, arrest and detention can only be ordered to prevent flight, and that only if the accused is in one of the above conditions (art. 113). The German law is in two respects less favourable to the accused than the French law; firstly, it permits arrest in certain cases when the act is a simple contravention punishable with fine only; secondly, it imposes no limit on the duration of the preventive detention [2].

The general rule is that no person can be arrested or kept in detention except by order of a judge [3] (arts. 114 and 125). But any person may arrest in the case of an offence committed in his view; and in other cases officers of police and public security may arrest when there is danger in a dwelling (art. 127). The person arrested must be forthwith taken, according to circumstances, before the investigating Magistrate, the President of the Village Court, or before the Court itself, by whom he is interrogated at the latest on the day following that on which he is brought up, and by whom he can be set at liberty, if there are grounds for doing so (arts. 125 and 129). Persons under preventive detention must be treated with certain consideration. They are to be kept

[1] See *infra*.
[2] Cf. the French Code of Criminal Procedure, arts. 94 and 113.
[3] This term includes magistrate, and the *juge d'instruction*. The President of even the lowest court is called a judge in Germany. Both judge and magistrate are generic terms, and, if anything, magistrate is a higher term than judge.

as far as possible in a separate part of the prison, and are subjected to prison discipline only so far as is necessary for the maintenance of good order and their safe custody. They can also provide themselves at their own expense with commodities and occupations suitable to their situation and personal resources (art. 116). He can maintain connection with the outer world, when this is not forbidden by the *juge d'instruction*; and in all cases he may communicate freely with his defender.

Domiciliary Visits and Seizures.

Art. 123 of the Penal Code sanctions the inviolability of the domicile; but the judicial authority is not affected by this provision. Not only may houses of suspected persons be searched (art. 102), but houses of non-suspected persons also in order to arrest an accused, or to follow up the traces of an offence, or to seize certain specific objects (art. 103). With the exception of cases of flagrant delict or urgency, night visits are allowed only to arrest an escaped prisoner; but certain places, such as houses belonging to persons under police surveillance, gambling houses, and houses of ill fame, are outside the common law and can be visited at any time (art. 104).

A more important act, perhaps, than the search is the seizure, as it suspends for the time the right of property. This temporary expropriation can be applied to any object whatever, required or useful, for the purposes of the investigation (art. 94). Letters and telegrams addressed to the accused can be intercepted; also letters which there is reason to believe have come from him or to be meant for him (art. 99).

The Commencement of Proceedings.

When the preliminary investigation has been closed, the investigating magistrate sends the record to the Public Prosecutor, who transmits it to the Court. The Court then either sends the record before the competent Court, decides that there is no ground to proceed, or suspends the proceedings[1] in the case, according to circumstances (art. 196). Where there has been no preliminary investigation, such decision is come to after the lodging of the charge (art. 197). The *juge d'instruction* is not permitted to sit in the cases which he has investigated. The sending of the record to the competent Court is the crowning act of the preliminary procedure. After that commences the principal procedure (*Hauptverhandlung*). The witnesses and experts are again examined even

[1] This is done when the accused is absent or is of unsound mind.

when they have been examined at the preliminary investigation; but their depositions can be read at the trial if they have died, become of unsound mind, have disappeared, or are unable to appear (art. 250).

The Trial.

The accused is allowed a defender; and if he fails to appoint one, the Court appoints one for him in all cases which are triable by the Court of the Empire or the Court of Assize. Such appointment is obligatory in all cases, if the accused is deaf or dumb or under sixteen. The German Code shows greater consideration than the French Code for the rights of the defence. The judgment by default or contumacy is only allowed in very exceptional cases. The trial cannot commence in the absence of the accused except in the case of offences punishable with fine, simple imprisonment, or confiscation (arts. 229 and 231). But if the accused once appears, and absconds after his examination, the trial can be continued in spite of his absence, when the Court is of opinion that his presence is not indispensable (art. 230). The judgment by default can also be pronounced when the presence of the accused has been dispensed with at his request by reason of the distance of his residence; but the Court is not allowed to accord such permission, unless it is certain beforehand that the punishment to be inflicted will not exceed six weeks' imprisonment, fine, or confiscation (art. 232). If the accused has no known domicile in Germany, or if he resides abroad, and it appears impossible or inconvenient to make him appear, he is regarded as absent, and the trial can be opened provided the offence is punishable with fine only or confiscation (arts. 318 and 319). When proceedings are suspended owing to the absence of an accused, all steps may be taken to procure evidence and keep it intact, and all his property may be attached. An accused who is convicted in his absence may claim a retrial, if he can prove that a *vis major* or unforeseen circumstances and insurmountable difficulties prevented his obeying the summons (arts. 234 and 44). It is the opinion of jurists that the German legislator has gone too far in sacrificing the interests of the prosecution to those of the defence; and that the power to attach property is not of much use, as few criminals have any property to speak of. The disappearance of the accused, though not necessarily a proof, is at least in a majority of cases strong presumptive evidence of guilt. The criminal who escapes punishment by flight has only to allow the period of limitation to elapse, and then can return to Germany with a bold face, and has not even to suffer the disgrace resulting from a conviction, a disgrace which, in countries where the

judgment by default is admitted, is some sort of substitute for the punishment itself. Such a result is as injurious to morality as it is compromising to public security.

In jury trials, a majority of two-thirds is necessary for the conviction of an accused (art. 262). In cases before the Court of Assize, eight out of twelve jurors must agree (art. 307); but, as regards the refusal to admit extenuating circumstances, seven jurors must agree; that is, if the numbers are equal, the benefit of such circumstances is given to the accused (art. 277). After the arguments are over, the President points out to the jury the points of law which they have to take into consideration in the accomplishment of their task, but he is not allowed to discuss the facts or the value of the evidence (art. 300); nor can he call their attention to the arguments put forward by the prosecution and the defence. The jury return their votes or verdicts on certain questions put to them, and the Court (not the President only, as in France) pronounces acquittal or conviction (art. 314).

The Appeal.

During the debates on the Code the question whether there should be any appeal against criminal decisions was keenly debated. The original draft decided the point in the negative. It was urged that the appeal, at least as regards the question of culpability, was quite incompatible with the principle of the oral nature of the trial; the judge forms his conviction on what he hears and sees at the trial; the demeanour, the attitude, the facial expression of the witnesses are all facts which influence his opinion and determine him to attach more or less credence to their statements. A mere record is powerless to fix these impressions and undefinable *nuances*. But it is on the record only that the appellate Courts decide. It is true that they have the power to recall and hear the witnesses for themselves, but after a lapse of time the witnesses can compose their demeanour and assume an attitude quite different from that which they had displayed in the first instance. Moreover, although the appellate judges may be more learned in law, it cannot for a moment be admitted that they are better judges of facts than the lower courts. These were the considerations which determined the Austrian Legislature in 1873 to leave questions of fact entirely to the judges of first instance, allowing an appeal only on questions of law[1]. More radical, the German Government proposed to suppress the appeal altogether. The Commission of the Reichstag at first rejected the proposal, but

[1] Austrian Code of Criminal Procedure, arts. 283, 345, 464.

ultimately advocated a mixed system, which has been adopted in the Code. This system is based on a distinction between judgments of District Courts and Courts of Assize, on the one hand, and the decisions of the Courts of Assessors on the other, only the latter being made appealable. It would have been more logical to disallow the appeal altogether, but the reasons given for allowing an appeal from the decisions of the Village Courts of assessors were that they were not preceded by any preliminary inquiry, that certain restrictions could be placed on the production of evidence for the defence, and that only one of the judges composing them had any juridical knowledge.

Revision.

The *revision* corresponds to the French *pourvoi en cassation*, is applicable only to the decisions of Courts of Assize and District Courts, and can only be based on a violation of law (art. 376). For the rest, the powers of the German Courts of Revision are much more extensive than those of the French Court of Cassation; for the latter can never finally decide a case, but, after quashing a judgment, must send the case back again for rehearing, whereas the German Courts can in some cases decide the matter finally themselves, and are not bound to send it back.

The review is not properly a mode of revision, as it can be ordered only in respect of those judgments which have become final, and the application is made to the Court which has decided the case. This means of relief has for its object to upset decisions which have become unassailable, and to cause the proceedings to commence afresh, either because new evidence or facts have been discovered since the judgment, or because the first decision has been rendered under circumstances which radically vitiate it, or finally because certain documents or exhibits produced at the trial have been proved to be false or falsified. The review can take place either for the benefit of the convicted person (art. 399) or to his prejudice (art. 402). It can be claimed, not only by the convicted person, but even after his decease by certain relatives, in order to rehabilitate his memory (art. 401). It corresponds to the revision of the French criminal law [1], though it is exercised over a much wider field.

Exceptional Jurisdiction or Procedure.

The general rules of procedure in the Code are common to all jurisdictions. However, there are some exceptions. In the Village

[1] French Code of Criminal Procedure, art. 443 seqq.

Courts a prompt and summary procedure is in force for the decision of contraventions and offences of slight importance. It is very similar to the procedure in the Austrian Code of 1873, known as 'summary procedure' (*Mandatsverfahren*). The judge of the bailiwick, on the written requisition of the Public Prosecutor, passes sentence without the aid of assessors, and without any preliminary trial (art. 447). This procedure has distinct advantages for the accused, as it obviates loss of time, expense, and the harassment of a public trial. It is only resorted to in comparatively petty cases, as the punishment which can be inflicted in this way must not exceed a fine of 150 marks, simple imprisonment for six weeks and confiscation. Moreover, it is generally adopted when the facts are clear and well established by the report (*protokoll—procès verbaux*). If the accused thinks he has cause to complain of the sentence, he can oppose it within a week of its intimation to him (art. 449), and it then comes before the Court of Assessors regularly constituted and proceeding in conformity with the ordinary rules.

Among the other exceptional procedures admitted by the Code, there are two which deserve notice, as an administrative functionary takes the place of the Court. The first is employed in the matter of contraventions, the second in dealing with infringements of the fiscal laws. Certain contraventions can, by the particular legislation of the different States of the Empire, be made over to the administrative or municipal police authorities and punished by a simple penal order, provided the punishment does not exceed fourteen days' simple imprisonment, fine, or confiscation (art. 453)[1]. Similarly administrative authorities may punish breaches of the laws relating to taxes and public contributions, provided the punishment be fine or confiscation[2] only (art. 459). In both cases the convicted person can either appeal to the superior police or administrative authority, or, if he prefer it, can claim to be tried by the ordinary Court, that is, the Court of Assessors or the District Court. These exceptional modes of procedure are doubly advantageous, saving time and considerably reducing the costs; while as to the accused, he is amply protected against arbitrary conviction by the dual recourse allowed to him, administrative or judicial.

This brief sketch of the principal provisions of the Code will give an idea of the German criminal procedure of to-day. The Code has many points in common with the French Code of Criminal

[1] The amount of punishment differs in different States. Some States exclude contraventions of a graver nature. In Baden and three other States contraventions of the Railway Law can be administratively tried and fined by the railway authorities.

[2] In India, Forest Officers may compound offences against the Forest Act by imposing a penalty, and the Collector may, instead of prosecuting, impose penalties for infringements of the Stamp Law.

Procedure, but it is more scientific in its method and more logical in its arrangement. It is also more liberal, and pays more consideration to the interests of the accused. It deserves to be studied by all judges who administer criminal law, and also by the legislators of those countries which are engaged in the reform of their criminal procedure.

H. A. D. PHILLIPS.

MODERN LEGISLATION IN THE UNITED KINGDOM.

THE mantle of the Roman Praetors seems of late years to have fallen upon our Imperial Legislators. Since 'Equity crystallized under Lord Eldon,' Acts of Parliament are the only means of 'assisting, supplementing, or correcting the ordinary law' of the land.

The Legislature is, however, at a disadvantage in one respect. The Praetor not only promulgated new law in his Edict, but he presided in the law court and explained and administered the law he had thus introduced. In the United Kingdom Parliament makes the laws, but (except to a moderate extent when the House of Lords sits as a final court of appeal) the duty of interpretation is cast upon a body of men widely different. The laws are made by men, the majority of whom have no knowledge, either by education or experience, of the legal meaning and effect of the rules they lay down; and, in many cases, the statutes require a considerable amount of judicial exposition before the so-called 'intention' of the Legislature can be definitely ascertained. In interpreting the law of England, the Judges of the Supreme Court are progressing or retrogressing more and more to the position taken up by the Common Law Judges whose duty it was, some 600 years ago, to construe the Statute of Westminster the Second and the writs issued under that statute *in consimili casu*; and, almost invariably, it is not the spirit, but the strict letter—the actual literal meaning of the words—that forms the basis of a modern decision upon an Act of Parliament. No doubt a judge's duty is to expound laws and not make them, but there are occasions on which the application of this principle has been pushed beyond its extreme limits. The celebrated jurist and former judge, Sir James Fitz-James Stephen, in an article on 'Gambling and the Law' in the *Nineteenth Century* for July 1891, called attention to a striking instance of this kind in the decision of the Court of Appeal in the case of *Read* v. *Anderson* (L. R. 13 Q. B. Div. 779), the result of which was that the Gaming Act 1845 became a dead letter whenever the bet was made by an agent in his own name on behalf of his principal. A judicial interpretation of this kind could never have been contemplated by the framers of that statute, and the Gaming Act of 1892, which virtually overrules *Read* v. *Anderson*, has probably diminished

considerably the number of agency transactions of this nature. The Conveyancing and Law of Property Act 1892 is another example of the remedial action of the Legislature in correcting narrow interpretations of a former statute. Misinterpretations by the judges, of language which appears to bear a clearly different meaning to other intelligent men, are, however, few and far between; and the growing necessity for the judicial construction of recent statutes may more properly be ascribed, not to a tendency on the part of the judges to draw fine distinctions, but to the ambiguous wording of the statutes themselves. The case-law of England is certainly increasing, in bulk at all events, at a much more rapid rate than the statute-law. Of the eight volumes of Law Reports issued annually by the Incorporated Council of Law Reporting for England and Wales, one alone is sufficient to contain all the Acts of Parliament of the year, public, local, and private; the remaining seven consist entirely of reported cases. A glance at the 'Current Index' will show how many of these cases are concerned with the interpretation of a statute or statutes, the proportion for the year 1892 (not including decisions on statutory rules) being nearly 40 per cent., most of them relating to statutes passed within the previous twelve years.

It would seem therefore of the utmost importance that all bills should be carefully drafted and settled by competent authorities before they become law; but this is precisely the fate which rarely, if ever, attends a great number of them.

The Government bills are the most fortunate, being, as a rule, drafted in the office of the Parliamentary Counsel, or of his assistant; and if the head of a public department, such as the Board of Trade or Local Government Board, is in charge of a bill, the clerks of the department also bestow some of their divided attention upon it. During the progress of important bills the services of the Parliamentary Counsel are in great and constant demand; but neither he nor his learned assistant is omniscient or infallible. The public bills introduced by private members fare very much worse. Apart from the scant attention which is their lot, owing to the demands made on the time of the House of Commons by the Government of the day, they are maimed at their birth, as it were, by being drafted by incompetent hands. Unfortunately, in spite of their many adversities, some of them happen to pass—usually with deplorable results. The Married Women's Property Act 1882 was a private member's bill. It may be cited as an 'awful example.' There is not a single section, hardly a single phrase of the Act, indeed, which has not required judicial interpretation.

Even the Government bills have a sufficiently tempestuous career. Leaving out of consideration bills purely political—i.e. introduced by the Government as a reward for the past, or a bribe for the future, votes of a section or sections of the electorate—which are generally considered by a committee of the whole House, Government bills after they have passed their second reading, are, as a rule, referred either to a special committee of members more or less acquainted with the branch of law on which they touch, or to one of the Grand Committees. It is another anomaly that one of the Grand Committees should have for the subject from which it takes its name of the 'Grand Committee on *Law*,' the one which ought to concern them all.

From the Committee and Report stages, the most carefully drafted bills often emerge greatly impaired by the addition of amendments accepted in a hurry for the sake of appeasing some particularly hostile opposition.

The final result is that our modern legislation presents a number of defects which may be considered under the following heads as exemplified in the Acts themselves:—

(*a*) Incompleteness;
(*b*) Obscurity;
(*c*) Want of Uniformity, and Interdependence.

These divisions, although they occasionally overlap, are sufficiently distinct to be worthy of separate consideration.

In reference to the incompleteness of modern Acts of Parliament, it must be admitted at the outset, that it is absolutely impossible to provide for all future conditions of society or to guard against every expedient by which an ingenious lawyer may drive a metaphorical 'coach-and-four' through an Act of Parliament. Nevertheless by a consideration of the statutes passed in very recent years, it is evident that the haste with which they have been hurried through Parliament, or the lack of sufficient knowledge on the part of their sponsors or draftsmen, has caused an incompleteness which might have been avoided and which has required to be speedily remedied.

Thus, a statute dealing with mortmain and charitable uses has been passed in each of the years 1888, 1891, and 1892; that of 1888 having for its object the codification of the then existing law on the subject. The Foreign Marriage Act 1892 has repealed and substantially re-enacted with amendments the Marriage Act 1890, and the Foreign Marriage Act 1891. The Friendly Societies Act 1888 (which amended section 30 of the Friendly Societies Act 1875) was repealed and re-enacted with a small but material alteration by the Friendly Societies Act 1889. The Lunacy Act

1891 amended the Lunacy Act 1890; the Bills of Sale Act 1891 amended the Bills of Sale Act 1890; and the Forged Transfers Act 1892 amended the Forged Transfers Act of 1891. Even in the past phenomenal year of grace, 1893, time was found for 'An Act to amend the Public Libraries Act 1892'—56 Vict. c. 11—passed June 9, 1893. Nor is this state of things by any means a recent evil. It was commented upon upwards of twenty years ago by the editors of the English edition of M. Ortolan's *Histoire de la Législation Romaine*, who, at page xviii of their Translator's Introduction, remarked as follows:—

'At the present moment our legislature is in the habit, as circumstances may require, of issuing Acts of Parliament. These are, in fact, means of amending, abrogating or supplementing existing law. The great defect of the present system is that, instead of withdrawing, upon each occasion when alteration is found necessary, the existing law upon any given subject, that which exists is allowed to remain; generally, however, it is mutilated, and a new Act is promulgated introducing certain changes. The result is that, in order to ascertain the actual law upon the point under consideration, it is necessary to refer to a variety of Acts, and much unnecessary labour and expense and the risk of uncertainty and inaccuracy is the consequence. All these difficulties might be obviated and the obscurity removed if whenever any alteration was required in a portion of a statute, the whole statute was repealed and a new Act introduced, reproducing those portions which required no amendment and containing the modified or the new clauses in their proper place.'

The remedy thus suggested would obviously be often too drastic. Four-fifths of the Conveyancing and Law of Property Act 1892, for example, consist of amendments of subsection 6 of section 14 of the Conveyancing and Law of Property Act of 1881; and it would, it is submitted, be a waste of energy to repeal the whole 73 sections of the Act of 1881, for the purpose of amending one subsection of a section. The Legislature might, however, have adopted the plan of repealing subsection 6 instead of patching it up in this cumbrous fashion by means of sections and subsections. Moreover, in each of the cases of the Bills of Sale Act 1891 and the Forged Transfers Act 1892, it would, since the Acts requiring amendment were so short, have been a distinct advantage to follow the principle of repeal and re-enactment carried out in some of the instances previously mentioned.

Secondly: as to the charge of obscurity.

The best proof, perhaps, of the existence of this defect may be obtained by referring to the second section of the Forged Transfers Act 1892, which runs as follows:—

'Whereas, by subsection 1 of section 1 of the Forged Transfers Act 1891, it is provided that such company or local authority as therein mentioned "shall have power to make compensation by a cash payment out of their funds for any loss arising from the transfer of any such shares, stock, or securities, in pursuance of a forged transfer, or of a transfer under a forged power of attorney," and it is expedient to remove doubts as to the application of the Act to losses and forgeries before the passing of the Act.'

Other examples may be found in the Married Women's Property Act 1882, already referred to, and in the Bills of Sale 1878 Amendment Act 1882. Of the latter Act, for example, in the *Wimbledon Local Board* case (57 L. T. (N. S.) 55, 1892) Mr. Justice Day, speaking of section 14, said:

'The section is no doubt very inconveniently and awkwardly framed, and obviously does not express what the Legislature intended to say.'

Thirdly: as to the want of uniformity.

A modern improvement in Acts of Parliament is the introduction of a section or sections giving a short title by which the Act may be cited, and explaining to some extent the construction of the Act by stating that it is to be read and construed as one with some Act or Acts previously passed, affecting the same branch of law. Sometimes these explanatory sections appear at the commencement of the Act, sometimes toward the end: occasionally one set of words, at other times a different set of words, is used to express the same mode of citation or construction. Thus in 1890, three statutes were passed relating to public companies. These Acts, which form consecutive chapters on the roll of statutes and received the Royal Assent on the same date—August 18, 1890—show a want of uniformity in this respect.

In the Companies (Memorandum of Association) Act 1890, 53 & 54 Vict. c. 62, the sections which are at the end of the Act read as follow:—

'3. (1) This Act may be cited as . . . &c.

'(2) This Act and the Companies Acts 1862 to 1886 shall be construed as one Act, and may be cited collectively as the Companies Acts 1862 to 1890.'

In the Companies (Winding Up) Act 1890, 53 & 54 Vict. c. 63, the sections also appear at the end of the Act and are as follow:—

'35. (1) This Act may be cited . . . &c.

'(2) This Act and the Companies Acts 1862 to 1886 may be cited together as the Companies Acts 1862 to 1890.'

Lastly, in the Directors' Liability Act 1890, 53 & 54 Vict. c. 64, the sections appear at the commencement of the Act and are as follow:—

'(1) This Act may be cited as . . . &c.

'(2) This Act shall be construed as one with the Companies Acts 1862 to 1890.'

Again, during 1892, a most useful bill became law as the Short Titles Act. It provides alternative modes of citation in respect of many Acts of Parliament. It will, for example, be correct for the future to allude to the famous statute of William and Mary as the 'Bill of Rights.'

The Short Titles Act also provides a short mode of citation for various groups of Acts, but in setting out the various Acts which may be cited as the 'Companies Acts 1862 to 1890,' the draftsman has omitted the Directors' Liability Act 1890 while including the two other Companies Acts of that year.

Fourthly: as to the interdependence of the statutes. This is probably to the practising lawyer the most exasperating defect of all.

Recent examples are again sufficiently numerous. Thus the Stamp Act 1891 is by its longer title expressed to be 'An Act to consolidate the enactments granting and relating to the Stamp duties upon instruments, and certain other enactments relating to Stamp duties.'

Previous to the passing of this Act, the bulk of the law relating to stamp duties was contained in the Stamp Act 1870. The latter Act is almost totally repealed by the Stamp Act 1891; not altogether, however, sections 25 (3), 27, and 28, of the Act of 1870 are expressly left unrepealed. In spite of the alleged codification, it is therefore necessary for the practitioner to remember that the Stamp Act 1891, and the Stamp Duties Management Act 1891 do not form a complete code on stamps and stamp duties, but that in respect of one or two minor matters he must refer to the Stamp Act 1870.

The Housing of the Working Classes Act 1890 is another instance. This Act was passed to amend the short Act of 1885, which bears a similar title, and to incorporate some earlier Acts. The draftsman of the Act of 1890 is to be commended for the manner in which he has included in the Act (sec. 75) a provision (sec. 12) of the Act of 1885, which is repealed and thus re-enacted by the Act of 1890. By the use in the latter Act of the words, 'In any contract made after the fourteenth day of August 1885'—the date of the 1885 Act—this repealed provision of the 1885 Act is kept alive from the

moment of its birth as it were. Why then, with this excellent mode of repealing and re-enacting present in his mind, did the draftsman of the 1890 Act leave unrepealed five sections of the Act of 1885? The Housing of the Working Classes Act 1890 is also illustrative of another phase of interdependence. A house for the working classes is, in the above-mentioned section 75 of the Act, described as 'A house or part of a house at a rent not exceeding in England the sum named as the limit for the composition of rates by section 3 of the Poor Rate Assessment and Collection Rate 1869, and in Scotland or Ireland four pounds.' And it becomes necessary to refer to the last named Act for these particulars, which fix certain rents for certain of the cities of England therein named, and a rent of £8 for houses in any other part of England. It is hardly an excuse that in this matter the draftsman was repeating the exact wording of the Act of 1885.

Similarly, the Law of Distress Amendment Act of 1888 refers for a description of goods thereafter exempt from distress to section 96 of the County Courts Act 1846, 'or any enactment amending or substituted for the same'; and curiously enough, by the County Courts Act 1888, passed within the following six days, section 96 of the Act of 1846 was repealed and re-enacted.

In conclusion, it may be remarked that the illustrations of imperfect legislation which appear in the foregoing pages are taken from sessions of Parliament previous to that of 1893, and they are therefore not affected by the peculiar difficulties in the way of careful legislation during that year.

In some instances the mere mention of the defect suggests its appropriate remedy, but it should not be impossible for those who make politics their business, to devise a scheme under which the majority, if not the whole, of the existing defects might be obviated.

It is not, I think, within my province to put forward such a scheme, but one or two suggestions tending towards a possible amelioration may not be altogether out of place.

1. It is still true, as Bagehot remarked, that the House of Commons 'tries too much'; witness the annual Expiring Laws Continuance Act.

It would be better to try less and do the work thoroughly.

2. The plan of carrying forward the unfinished bills of one Parliament to the same stage in the Parliament of the following year, is one which has been found to work well with private bills, has received the approval of the Associated Chambers of Commerce (at Cardiff, September 21, 1892), and might well be applied to public bills with a sufficient safeguard, e. g. a three-fifths majority at the second reading.

3. The employment of experts, which has also worked well, as instanced in the Conveyancing Acts, might be extended.

4. Greater encouragement should be given to the conversion into statute law of the various attempts by trained lawyers to codify particular topics of law, of which attempts the Bills of Exchange Act 1882, the Partnership Act 1890, and Judge Chalmers' Sale of Goods Bill, now before Parliament, may be cited as successful examples.

5. Adopting the words of Professor A. V. Dicey in his 'Law of the Constitution,' with the reservation that in this case also safeguards would be required:—

'The substance no less than the form of the law would, it is probable, be a great deal improved if the executive government of England could, like that of France, by means of decrees, ordinances or proclamations having the force of law, work out the detailed application of the general principles embodied in the Acts of the Legislature [1].'

6. And, finally, if a much modified return were made to the ancient practice when the judges drew up the statutes at the end of the session; if all bills were retained, say, at the Report stage, until a committee, composed of the judges and of paid legal experts specially appointed, had examined them and had made such suggestions as might be necessary to obviate anomalies and carry out the apparent intention of the Legislature, we might, possibly, be a little nearer to the millennium foreshadowed so eloquently by Lord Brougham in his great speech upon 'The present state of the Law [2].'

FRANCIS E. BRADLEY.

[1] First Edition, page 49; which see, for a fuller exposition of Mr. Dicey's views.

[2] House of Commons, Feb. 7, 1828: *Speeches*: A. and C. Black, 1838, Vol. II. p. 195.

THE VAGLIANO CASE IN AUSTRALIA.

THE question under what circumstances the payee of a bill of exchange is to be deemed 'a fictitious or non-existing person' so that the bill may be treated as payable to bearer was discussed at great length in the case of the *Bank of England* v. *Vagliano*[1]. That case had special reference to forged documents purporting to be bills of exchange properly so called. The question under what circumstances the principle laid down in that case is applicable to the payee of a cheque or of a promissory note was not then under consideration, but it is one of great importance in commercial transactions. The question as relating to promissory notes is of special importance in Australia, where promissory notes are used much more frequently than bills, and in business transactions are usually spoken of as bills; and this question has recently been engaging the attention of the Supreme Court of New South Wales.

According to the decision of the House of Lords in Vagliano's case, although the person named as payee in a document purporting to be a bill, and to whose order the pretended bill is made payable on the face of it, is a real person, if he has not, and never was intended by the drawer to have, any right upon it, or arising out of it, he may be deemed to be 'a fictitious or non-existing person' within the meaning of s. 7 (3) of the Bills of Exchange Act, 1882, and the document may be treated as a bill payable to bearer. Supposing a rogue instead of drawing a false bill and forging the drawer's name, and then obtaining a real acceptance, as Glyka did in that case, induces by false pretences a responsible person to make a promissory note payable to a certain firm or order, and then obtains possession of the note: does the fact that the firm has not and never was intended by the rogue to have any right upon the note or arising out of it, make the firm 'a fictitious or non-existing person' within the meaning of the section, and the note payable to bearer? Is it material to inquire whether the firm named is a real existing firm carrying on business, or whether it has ceased to carry on business, or whether it is altogether an imaginary firm, never having had any existence in fact? Or on the other hand, does the fact that the rogue is

[1] '91, A. C. 107. [See LAW QUARTERLY REVIEW, vol. vii. p. 216.]

here no party to the instrument, and has not procured a forged bill to be accepted, but has by false pretences procured a real note to be made, render this case distinguishable from that of Vagliano?

These questions arose for decision recently in New South Wales in the case of the *City Bank* v. *Rowan & another*, which was argued and decided last March in the Supreme Court, constituted of Sir Frederick Darley, Chief Justice, Mr. Justice Innes and Mr. Justice Foster. The action was brought on a dishonoured promissory note for £574, dated December 22, 1891, made by the defendants payable to 'J. Shackell & Co. or order' four months after date, and purporting to be indorsed by J. Shackell & Co. to Jones & Co. and by the latter to the plaintiffs. The promissory note was made by the defendants under the following circumstances:—In December 1891, a man named William Shackell called on the defendants at their warehouse in Sydney, and represented that he had 150 bales of wool packs for sale on account of Messrs. James Shackell & Co., of Melbourne, and that he was related to Mr. J. Shackell of that firm; and negotiations for the sale of the bales to the defendants then took place. In the course of the negotiations William Shackell introduced to the defendants a man whom he represented to be a Mr. Jones, carrying on business as Jones & Co. who, he alleged, was the agent in Sydney for James Shackell & Co. The price of the wool packs being agreed upon a sale note was signed: 'William Shackell for James Shackell & Co.' The following day a document purporting to be a store warrant for the bales of wool packs was handed over to the defendants, who thereupon handed the promissory note, the subject of the action, to Jones, who gave a receipt for the promissory note which he signed: 'J. Shackell & Co., per Jones & Co.' The defendants shortly afterwards discovered that they had been the victims of a fraudulent conspiracy on the part of the two men, W. Shackell and Jones, who in fact had no wool packs to dispose of, and no authority to act for James Shackell & Co., or any other firm. W. Shackell was subsequently convicted of conspiracy, while Jones absconded. Meanwhile they had between them forged on the note one indorsement purporting to be that of 'J. Shackell & Co. without recourse,' and another indorsement purporting to be that of 'Jones & Co.,' and discounted the note with the plaintiff Bank at the current rate of discount, the Bank relying on the defendant's signature and discounting the note bona fide in the ordinary course of business. The defendants on becoming aware of the fraud and that the promissory note was under discount with the plaintiff Bank gave notice to the Bank on February 6, 1892, that they repudiated the contract of sale and any liability in respect of the note on the

ground that it had been negotiated by means of a forged indorsement. The promissory note was duly presented for payment at maturity, but payment was refused.

At the time when the defendants made the promissory note there was no person or firm in Melbourne or elsewhere carrying on business under the name of James Shackell & Co. or J. Shackell & Co., but at a time some years previous to the making of the note, a certain Mr. James Shackell had carried on business in Melbourne under the style of 'James Shackell & Co.,' and Mr. James Shackell was still alive in Melbourne at the time of the making of the note, but had ceased to carry on business. The plaintiffs were not aware of these facts. The defendants when they made the note were not aware that the firm of James Shackell & Co. had ceased to exist, but believed that they were in fact dealing with that firm and in that belief inserted the name of J. Shackell & Co. as payees in the note. Under these circumstances the Court held that the payee was a fictitious or non-existing person, and that the note might be treated as payable to bearer, and on this ground ordered the verdict to be entered for the plaintiff Bank.

The Chief Justice in delivering the judgment of the Court, after a short statement of the facts, said:—

'We are of opinion that this case falls precisely within the law laid down in the *Bank of England* v. *Vagliano*, which is to the effect that wherever the name inserted as that of a payee in a bill or note is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, s. 7, sub-s. 3, and that such bill or note may be treated by a legal holder as payable to bearer. Here James Shackell & Co., the supposed payees, even if an existing firm, had no interest in the note, no right to indorse it, or be paid upon it; and as they had not, then no person as payee had any such right. The payees were accordingly fictitious persons, and the plaintiffs are therefore holders of this note as if it were payable to bearer, and may, as such holders, sue the defendants, as makers, upon a note made payable by the defendants to bearer. It is argued that as the indorsement of James Shackell & Co. is forged, the plaintiffs cannot claim under a forged indorsement. This would be so if James Shackell & Co. were real payees, but as they are fictitious payees they could not indorse. The forged indorsement may accordingly be treated as a nullity, and the defendants are liable as though the note was by them made payable to bearer. We are, therefore, of opinion that the plaintiffs are entitled to recover upon this note[1].'

[1] New South Wales Weekly Notes, vol. ix. pp. 122–3.

The English Bills of Exchange Act, 1882, has been re-enacted in the seven principal Australasian Colonies in the following order of date; viz. New Zealand in 1883, Victoria in 1883, where the Act has since been repealed and re-enacted as Part I. of the Instruments Act, 1890, Western Australia, South Australia, Queensland and Tasmania in 1884, and New South Wales in 1887; and although every section of the English Act is not reproduced in identical words in each of those Colonies, speaking generally the differences are very slight. The importance therefore of the above decision, if it is to be regarded as correctly laying down the law as to the interpretation of s. 7 (3) when applied to a promissory note, is manifest.

It will be observed that in this case the Court did not base their decision on the ground that at the time when the note was made there was no existing firm of James Shackell & Co., but on the ground that even if there were such a firm they 'had no interest in the note, no right to indorse it, or be paid upon it.' The name of a payee was inserted, it was said, without any intention that payment should be made only to such payee or his order, and therefore the case fell precisely within the principle of Vagliano's case. When it is said that the name of the payee was inserted without any intention that payment should be made only to such person or his order, it must mean without any intention on the part of the conspirators, W. Shackell & Jones. It is admitted that so far as the makers of the note were concerned they had the fullest intention that it should be paid only to James Shackell & Co.'s order, although had they not been fraudulently misled as to matters of fact they would have formed no such intention and given no promissory note. In the same way, it may be argued, in Vagliano's case the acceptor of the so-called bills fully intended that they should be paid only to Petridi & Co.'s order, yet as Glyka who in fact drew them never intended Petridi & Co. to be the payees, they were deemed to be fictitious or non-existing persons, although in fact they were a real firm in the habit of doing business with Vagliano, the acceptor. Where then lies the difference between the two cases?

Although it is true that the position of maker of a note corresponds for the most part with that of acceptor of a bill, this must be taken with the necessary modifications arising from the difference in the nature of the two instruments: see s. 89 of the Act. The acceptor of a bill is estopped from denying as against a holder in due course the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill: s. 54 (2) (*a*). No such estoppel can affect the maker of a note

to whom there is no prior party to stand in a position corresponding to that of drawer. Indeed in some respects the maker's position strongly resembles that of drawer of a bill. The maker of a note, like the drawer of a bill, is the creator of the instrument. It is he who names the payee. He is estopped from denying as against a holder in due course the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement: cf. sections 54 (2) (*c*), and 55 (1) (*b*).

The original theory of a bill is that the drawer has effects in the hands of the acceptor against which he draws. 'A drawee who accepts a bill,' said Lord Herschell in the *Bank of England* v. *Vagliano*[1], 'does so either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment: that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as directed so as to be able to charge the drawer.' The maker of a note, on the other hand, himself promises to pay a sum of money on demand or at a future time. Who is to be named in the note as payee is a matter for his choice alone. If he promises to pay to a certain existing person only, no one else can as a general rule claim payment. If he promises to pay to a certain existing person's order, he can as a general rule refuse to pay except on that person's indorsement. If he has been induced to make the promise by means of false representations, can he not still refuse to pay except on that person's indorsement? Does the circumstance that some rogue, who by false representations got the note made, never intended that the payee named therein should receive the money, deprive the promisor of this right to refuse payment if the note is not indorsed by the payee named by him; and can he be on that account compelled to pay to any holder who has taken the note bona fide for value but on a forged indorsement? Does Vagliano's case establish such a proposition?

If this be the effect of section 7 (3) of the Bills of Exchange Act on notes made payable to order, surely a very wide door has been opened to fraud. If it be the law as to promissory notes, it must apply with certainly equal force to cheques. The most careful man of business may at some time be made a victim to a skilfully devised fraud. Is the circumstance of his making a promissory note or cheque payable to the *order* of a payee to afford him no protection in case of forgery? Is the circumstance that the man

[1] '91, A. C. 147-8.

who induced him to make the note or cheque had no intention of its reaching the payee named sufficient to constitute the payee a fictitious or non-existing person so that the note or cheque may be treated as payable to bearer? Is it not the intention of the maker of the note or of the drawer of the cheque as to who is to be the payee that must be regarded, and not the intention of the man who may by a false pretence have procured the note or cheque to be given, but who is himself no party to the instrument? If the maker of the note intends it to be paid only to the order of the payee whom he names, can it be said, in the language of Lord Herschell, that 'the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith[1]?'

If, however, the New South Wales decision in the *City Bank* v. *Rowan* cannot be supported on the ground stated, the more difficult question remains: Can it, having regard to the facts of the case, be supported on any other ground? Although the defendants at the time of making the note fully intended it to be paid only to the order of James Shackell & Co., that firm had, unknown to them, ceased to exist. Was then the firm of J. Shackell & Co. 'a fictitious or non-existing person' within the meaning of s. 7 (3) of the Act? That the firm at that time had actually ceased to exist is admitted. But does the mere fact that a person or firm named as payee has ceased to exist render such payee 'a fictitious or non-existing person' within the meaning of that section?

Suppose that Brown owes Smith £100, and Brown intending to pay Smith draws a cheque at 11 a.m. for the amount payable to Smith or order, and posts it to his place of business. That morning at 10 a.m. Smith dies, but Brown does not hear of his death till some days later. Smith's letters are opened by a dishonest clerk, who forges Smith's signature to the cheque and takes it to Jones, who in good faith cashes it. If Smith had died at 11.30 a.m. it is clear that Jones could not sue on the cheque, the forged signature being wholly inoperative: see section 24 of the Act. But as Smith died at 10 o'clock, can Jones sue on the cheque on the ground that at 11 o'clock, when it was drawn, Smith had become a fictitious or non-existing person, and therefore that the cheque was payable to bearer? Can the question whether a bill or note is payable to order or to bearer depend upon ascertaining the precise hour at which the payee may have died? Is such a distinction in accordance with principle? Even if the case be literally covered by the language of s. 7 (3), is it within the true meaning of that enactment? In Vagliano's case Lord Halsbury

[1] '91, A. C. 153.

came to 'the conclusion that, however expressed, the real meaning of the subsection is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill[1].' To use again the language of Lord Herschell, in whose conclusion four noble and learned lords concurred: 'Whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and the bill may, in each case, be treated by a lawful holder as payable to bearer[2].' As already observed, the intention here referred to is clearly the intention of the drawer who originates the instrument and names the payee. Now, in the case supposed, the intention of Brown when he drew the cheque was to pay Smith. The circumstance that Smith had died shortly before was *ex hypothesi* unknown to Brown when he drew the cheque. It cannot, therefore, possibly be said that Brown inserted Smith's name as that of the payee by way of pretence merely, without any intention that payment should be made only to Smith or his order. On the contrary his intention was that payment should be made only on Smith's indorsement, and if Smith had lived for another hour it seems clear that no one could have enforced payment of the cheque without that indorsement but Smith's personal representatives[3].

To return now to the facts in the *City Bank* v. *Rowan*, it appears that the defendants knew, at any rate by reputation, James Shackell & Co., the name under which Mr. James Shackell had carried on business in Melbourne, but they did not know that he had ceased to carry on business. They were induced by false pretences to make a sham purchase of goods, and believing that the goods were in existence and were ready to be delivered to them, they made their promissory note for the purchase money payable to 'J. Shackell & Co. or order.' Here again, as in the above hypothetical case of the cheque, it cannot be said that the defendants inserted J. Shackell & Co.'s name as that of the payees by way of pretence merely, without any intention that payment should be made only to that firm's order. Their intention, it is clear, was that payment should be made only on that firm's indorsement. Does not this distinguish the case in principle from that of the *Bank of England* v. *Vagliano*?

If the circumstance that the person named as payee in a promissory note or cheque was at the time of making it dead, or that

[1] '91, A. C. 122. [2] Ib., 153.
[3] Cf. *Murray* v. *East India Co.* (1821), 5 B. & Ald. 204.

the firm named as payee had at that time ceased to carry on business—such circumstance being unknown to the maker of the note or cheque—is alone sufficient to render the payee a fictitious or non-existing person within the meaning of the statute, so that the note or cheque may be treated as payable to bearer, large facilities for passing off such documents on forged indorsements seem to be afforded by this enactment, even in the case of inland notes or cheques, and the facilities will be far greater in the case of instruments made abroad, when, owing to distance, information of a person's death, or of dissolution of partnership, may frequently be delayed for a considerable time. This consideration, it is true, has little or nothing to do with the construction of the enactment in question, and if it be clear that the matter is governed by the decision in Vagliano's case, further discussion of it would be useless. If, however, the difference in the nature of the instruments, and in the position of maker of a note and drawer of a cheque on the one hand and of acceptor of a bill on the other, is such as to constitute the distinction suggested, it may be of some service to draw attention to the danger that appears to exist of that distinction being overlooked.

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INSURANCE OF LIMITED INTERESTS.

Mortgagor and Mortgagee.

IN the law of insurance against fire the questions of greater theoretical interest relate to insurances of what are known as 'limited interests.' Familiar examples of such interests exist where the right of property in the owner is qualified by a mortgage, lease, or subsidiary right arising out of the contract of sale, carriage or bailment. In the present article it is proposed to deal with the case of insurance by the mortgagor and mortgagee as a typical case, and as exemplifying the principles which apply to all insurances of limited interests. The fundamental principles are that a fire policy is a contract of indemnity, and that, in its usual form, it is a personal contract. The former is founded on considerations of public policy, and is a rule of law which cannot be set aside by consent of parties. It must not be confounded with the statutory rule against wager insurance, which requires that the insured should have an interest at the time of effecting the policy, but lays down no rule as to the amount recoverable in the event of a loss. The principle that the contract is personal is merely a rule of construction, and there is nothing illegal in a policy so framed as to attach to the property and pass to an assignee on a transfer.

The cases on fire insurance in America are much more numerous than in this country, and the theory of the law has consequently been more elaborately developed. It has therefore been thought necessary to refer to American authorities. The references are almost exclusively to cases decided in the Supreme Court of the United States, and to the decisions in the series of cases selected from the 'State Courts Reports' and republished in the 'American Decisions,' 'American Reports' and 'American State Reports[1].'

1. *Effect of mortgage on owner's insurable interest.—Amount recoverable under policy.*—The owner's insurable interest is not impaired by the existence of a mortgage or other lien upon his property. It would be otherwise if the debt were discharged by the loss of the security,

[1] The abbreviated references usually adopted are U. S. for Otto's Supreme Court Reports; Am. D., Am. R., and Am. St. R., for the American Decisions, American Reports, and American State Reports respectively. The fourth series of Court of Session Reports (Scotland) is referred to by the initial of the Reporter, R. In dealing with Scotch cases the Scotch legal phraseology has not been altered.

as in the case of a loan upon a bottomry or respondentia bond[1]. In these loans the risk of a total loss is upon the lender, and not on the owner, who can, therefore, recover under his policy of insurance the excess only of the value of the security over the amount of the advance[2]. Where the question is one of insurable interest it is not the legal but the equitable title that is regarded, and therefore the owner's rights are the same even where the security is constituted by a deed *ex facie* absolute[3]. But it is a defence to an owner's claim upon a policy of insurance that his interest in the subject insured has been divested by actual foreclosure of the mortgage or by a sale at the creditor's instance. And if he assign to creditors who release, his right to recover upon a policy in his own name is limited to the surplus, if any, which would have been due to him after the claims of his creditors had been satisfied[4]. So also if he sell his equity of redemption subject to the mortgage, his interest is limited to the amount of the unpaid mortgage debt for which he still remains liable if the security is destroyed[5].

2. *Mortgagee has no lien upon proceeds of mortgagor's policy except by contract or under statute.*—Where the insurance is effected in the owner's name, a mortgagee or other creditor holding a lien over the subject insured has in general no corresponding lien upon the money due upon the owner's policy in the event of a loss[6]. Nor does it give the mortgagee such a lien that the mortgagor is under covenant to insure or is bound to repair[7]. But if the mortgage deed provides that the proceeds of the mortgagor's policy shall be applied to the restoration of the damage or in liquidation of the mortgage debt, the mortgagee is entitled to insist that the proceeds shall be so applied, and his claim would be valid against the general creditors of the mortgagor[8]. And by the Conveyancing Act of 1881 mortgagees, where the mortgage is constituted by deed, and is subsequent to the date of the Act, are virtually in the same position as if the mortgage deed contained one or other of these provisions[9].

Under the 83rd section of the Metropolitan Building Act insurers

[1] *Alston* v. *Campbell*, 4 Brown's Parl. Cas. 476; *Hibbert* v. *Carter*, 1 T. R. 745; 1 R. R. 388; Arnold Ins. p. 85.

[2] Arnold Ins. p. 88.

[3] *Alston* v. *Campbell*, *supra*.

[4] *Lazarus* v. *Com. Ins. Co.*, 2 Am. L. Cas. 797, 801; 5 Pickering, 76; 19 Id. 81; *Seagrave* v. *Union M. I. Co.*, L. R. 1 C. P. 305, 319.

[5] Philip's Ins. sec. 287, citing *Gordon* v. *Mass. Fire & Mar. Ins. Co.*; 2 Pick. 249.

[6] *Lees* v. *Whiteley*, L. R. 2 Eq. 143; *Rayner* v. *Preston*, 14 Ch. D. 297, 18 Ch. D. 1.

[7] *Lees* v. *Whiteley*, *supra*; *Leeds* v. *Cheetham*, 1 Sim. 146; *contra*, *Nordyke & Marmon Co.* v. *Grey*, 2 Am. St. R. 219, 223; *Wheeler* v. *Ins. Co.*, 101 U. S. 439, 442, and authorities collected 2 Am. L. Cas. p. 834, 5th Ed.

[8] *Garden* v. *Ingram*, 23 L. J. Ch. 478, discussed in *Lees* v. *Whiteley*, and *Rayner* v. *Preston*, *supra*.

[9] 44 & 45 Vict. c. 41, sec. 23; Fisher's Law of Mortgage, sec. 1458. The Act does not apply to Scotland.

are authorized and required upon the request of any person 'interested in or entitled to' the buildings injured by fire, to cause the sum insured to be expended in reinstatement[1]. The owner of premises insured by his tenant has been held to be a person interested in, or entitled to the property, in the sense of this provision, but doubts have recently been thrown upon its applicability to mortgagees or purchasers from the insured[2]. It is clear that the Act contemplated insurances by policies so framed as to run with the lands, and not by policies, which, like ordinary fire policies, are personal contracts of indemnity. Where the policy is in the form of a personal contract the correct view seems to be that only those are entitled to the benefit of the Act who are parties to the contract of insurance as well as interested in the subject insured[3]. In any event the Act cannot operate to extend the insurer's liability beyond the interest of the persons with whom his contract is made. For instance, it cannot entitle a purchaser to the benefit of a vendor's policy where the title and interest of the vendor is wholly divested. A similar limitation applies to the provisions of the Conveyancing Act 1881. A claim under the Building Act must be made while the sum due upon the policy is still in the insurer's hands[4].

3. *Effect of indorsation of mortgagor's policy to mortgagee.—Joint policies.*—In the United States the mortgagor's policy frequently contains an indorsation directing payment in case of loss to be made to the mortgagee. This direction does not operate an assignment of the policy, or make the mortgagee a party to the principal contract. The indorsation constitutes properly a collateral contract, by his assent to which the insurer binds himself to pay in the manner directed, and in an action by the insured he may plead such payment as performance[5].

The result is the same whether the policy is procured and the premiums paid by the mortgagor or by the mortgagee, and the indorsation has no effect upon the contract as an insurance. Thus the insurer will be entitled to plead a breach of a condition by the mortgagor, as a defence to an action upon the policy or to claim contribution from other insurers of the mortgagor[6]. Conversely he will not be entitled to claim contribution in respect of

[1] 14 Geo. III. c. 78, sec. 83. This section applies generally to England. *Ex parte* Gorely, 4 De G. J. & S. 477, doubted in *Westminster Fire Office* v. *Glasgow &c. Soc.*, 13 App. Cas. 699, 713. The Act does not apply to Ireland or Scotland.

[2] *Ex parte* Gorely, *supra*; *Rayner* v. *Preston*, 14 Ch. D. 297; 18 Ch. D. 1; *Westminster Fire Office* v. *Glasgow &c. Soc.*, *supra*.

[3] Per Lord Selborne in *Westminster Fire Office* v. *Glasgow &c. Soc.*, *supra*.

[4] *Simpson* v. *Scottish Union*, 1 H. & M., 618.

[5] *Martin* v. *Franklin Fire Ins. Co.*, 20 Am. R. 372; *Coates* v. *Penn Fire Ins. Co.*, 42 Am. R. 327.

[6] Cases cited in previous note.

other insurance by the mortgagee [1]. A policy in this form is, therefore, to be distinguished from one which insures the mortgagor and mortgagee jointly, as where the parties are so described in the policy. In both cases the mortgagee is primarily entitled to the insurance money to the extent of the mortgage debt, but in the former case he is in general entitled, as the party in whose favour the appointment is made, to sue alone, while in the latter the action upon the policy must be brought by both the contracting parties [2].

When the indorsation is not to the whole sum insured, but is limited to the extent of the mortgagee's interest, there is some conflict of decision as to the right to sue upon the policy, but it has been held that the mortgagor may sue alone where his action is brought with the written consent of the mortgagee [3].

If a similar direction is made in a life policy the rule is different; the person to whom payment is directed to be made has, in that case, the sole and exclusive right to the policy. The distinction arises from the different nature of the contracts of life and fire insurance. The former is simply an agreement to pay a stipulated sum on a given event, and does not require that the assignee to the benefit of that obligation should have any interest in the life insured. If such a direction in a fire policy were held to have the effect of an assignation, the result would be to limit the insurer's obligation to the interest provable in the assignee.

4. *A lien, when valid, gives an insurable interest.—Interest need not be specified in policy.*—A mortgagee or other creditor who holds a lien has an insurable interest in the security [4]. A lien which is invalid in itself, as where it is constituted by an agent without authority, or where the pledge remains in the hands of the pledger, will not give an insurable interest [5]; but it is immaterial that the lien may be defeated at the instance of the grantor or of third parties, or that the title of the mortgagee is merely equitable [6]. A general creditor has, *a fortiori*, no insurable interest in his debtor's goods, and the fact that the loss of a ship or cargo will render the owner insolvent has been held not to entitle a creditor to insure [7]. A creditor may

[1] *Gillett* v. *L. L. & Globe Ins. Co.*, 9 Am. St. R. 784.

[2] *Rogers* v. *Grazebrooke*, 12 Simon, 557; *Motley* v. *Manufactures Ins. Co.*, 50 Am. D. 591; *Hammel* v. *Queen Ins. Co.*, 41 Am. R. 1.

[3] *Fire Insurance Co.* v. *Felrath*, 54 Am. R. 58; *Gillett* v. *L. L. & Globe Ins. Co.*, 9 Am. St. R. 784, citing *Westchester Fire Ins. Co.* v. *Foster*, 90 Ill. 121.

[4] *Godin* v. *London Assurance Co.*, 1 Burr. 490; *London & North Western Railway Co.* v. *Glyn*, 1 E. & E. 652; *Westminster Fire Office* v. *Glasgow &c. Soc.*, 13 App. Cas. 699; *Bell* v. *Western M. & F. Ins. Co.*, 39 Am. D. 542.

[5] *Stainback* v. *Fenning*, 11 C. B. 51; *Little* v. *Phoenix Ins. Co.*, 25 Am. R. 96.

[6] *Hill* v. *Secretan*, 1 B. & P. 315, 4 R. R. 806; *Columbian Ins. Co.* v. *Lawrence*, 2 Peters, 25 (S. Ct. U. S.); *Williams* v. *Roger Williams Ins. Co.*, 9 Am. R. 41; *Alston* v. *Campbell*, 4 Brown's Parl. Cas. 476.

[7] *Manfield* v. *Maitland*, 4 B. & Ald. 582; *Grevemeyer* v. *Southern Ins. Co.*, 1 Am. R. 420; but see *Rohrback* v. *Germania Fire Ins. Co.*, 62 N. Y. 47; 20 Am. R. 451.

insure his security by a policy in ordinary form upon the property, and is not bound to specify in the policy, or disclose to his insurer, the limited nature of his interest [1].

5. *Mortgagee's interest measured by debt.—Policy not assignable.—Exceptions.*—The mortgagee's policy becomes inoperative if the debt is paid, because he sustains no loss by the destruction of the security; but it will cover all advances made upon the security even after the date of the policy [2]. Nor is the mortgagee entitled, after his individual interest has lapsed, to assign the policy to the mortgagor, or to keep it alive for his benefit, unless the form of the policy is such as to admit of assignment, or to make the mortgagor a party to the contract [3]. This is the effect given by mercantile usage to the clause in a marine policy which extends the insurance 'to all to whom the property does or may appertain in part or in all,' or 'for whom it may concern,' but, except in the case of a bailee's floating policy, there is no such clause in ordinary fire policies, and the scope of the insurance is therefore limited to the persons named [4].

It is an exception to this rule that if the mortgagee hold the legal title to the security (and before the Registry Acts the mortgagee of a ship was in this position), he may insure in his own name for his own benefit, and also as trustee for a mortgagor or other person interested; but he must intend to cover such interest at the time of effecting the policy. And the same limitation applies to the case of an agent procuring an insurance in general terms 'for whom it may concern.' Only those persons are included in the general words and made parties to the original contract whom it was the agent's intention to insure when he obtained the policy. Thus in *Irvine* v. *Richardson*, where the insurance was effected by the mortgagee of a ship, under a marine policy in the usual form, the Court left it to the jury to say whether the insurance was intended to cover the defendant's own interest as mortgagee or that also of the mortgagor [5].

6. *Subrogation of mortgagee's insurer.*—Where the mortgagee, in the absence of any agreement as to insurance with the mortgagor,

[1] *Crowley* v. *Cohen*, 3 B. & Ad. 478; *Carruthers* v. *Sheddon*, 6 Taunt. 14; Duer on Ins. ii. 80; *King* v. *State Mut. Fire Ins. Co.*, 54 Am. D. 683; *Hubbard* v. *Hartford Fire Ins. Co.*, 11 Am. R. 125. *Contra*, *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546.

[2] *Carruthers* v. *Sheddon*, *supra*; Duer on Ins. ii. p. 43 et seq.

[3] *Lynch* v. *Dalzell*, 4 Bro. Parl. Cas. 431; *Sadlers Co.* v. *Badcock*, 2 Atk. 554; *Rayner* v. *Preston*, 18 Ch. D. 1; *Castellain* v. *Preston*, 11 Q. B. D. 380, per Bowen L.J., p. 398; *Ebsworth* v. *Alliance Mar. Ins. Co.*, L. R., 8 C. P. 596, per Brett J., pp. 637, 638; *McDonald* v. *Black*, 55 Am. D. 448; *New York Ins. Co.* v. *Flack*, 56 Am. D. 742. *Contra*, *Norwich Fire Ins. Co.* v. *Broomer*, 4 Am. R. 618.

[4] *Powles* v. *Innes*, 11 M. & W. 10; *Hooper* v. *Robinson*, 98 U. S. 528, 538; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 542; *California Ins. Co.* v. *Union Compress. Co.*, 133 U. S. 387, 410; *Newson* v. *Douglas*, 16 Am. D. 317, 320.

[5] *Irvine* v. *Richardson*, 2 B. & Ad. 193, 196; *Watson* v. *Swann*, 11 C. B., N. S. 756; Philips, sec. 383, and cases in two previous notes.

insures the security in his own name, the payment of a loss by the insurer is not a defence to an action for the debt against the mortgagor. He is not a party to the contract of insurance, and has no claim to the sum due under it, while on the other hand the mortgagee is not entitled to charge the premiums for the insurance upon the security [1]. At the same time the mortgagee is not entitled to obtain payment of his debt twice over, and his insurer has upon payment of the loss, and as an incident to the principle of indemnity, a right of subrogation to all the means competent to the mortgagee by which the loss may be made good. He is therefore entitled to the benefit of the mortgagee's lien over the salvage of the security, and any collateral securities he may hold for the debt, as well as his personal claim for the debt against the mortgagor. If the mortgagee has enforced any of these remedies in his own name, he holds the proceeds as trustee for the insurer; if they exist as rights of action, the insurer may sue upon them in the name of the insured, and retain the proceeds to the extent of the sum he has paid [2]. If the sum due and recovered upon the policy is less than the mortgage debt, the mortgagee is entitled to enforce for his own benefit his other remedies without interference from the insurer, to the effect of recovering a full indemnity. Beyond this he holds the proceeds for the insurer, and he cannot, after a loss, release his unenforced claims gratuitously, or otherwise defeat the insurer's right to an assignment [3].

7. *Right of subrogation of no value if debtor insolvent.—May be excluded by contract.—Effect of Conveyancing Act* 1881.—The insurer's right of subrogation will be of no value, or only of partial value, if the mortgagor is insolvent and the security destroyed. The remedy is also subject to the limitation that the insurer, as a mere assignee, may be met by any defence which would have been valid against the insured. Thus if the mortgagee have, before the loss, contracted with the mortgagor that the sum recovered under his policy shall be reckoned as part payment of the mortgage debt, or that it shall be applied for the mutual benefit in restoration of the damage, the insurer has no right of recourse against the mortgagor [4]. On the same principle an insurer who has paid to the owner of a vessel a loss caused by collision has no right of recourse if the insured is also

[1] *Dobson* v. *Land*, 8 Hare, 216; *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Brook* v. *Stone*, 34 L. J. Ch. 251; *Rayner* v. *Preston*, 14 Ch. D. 297; 18 Ch. D. 1.

[2] *Castellain* v. *Preston*, 11 Q. B. D. 380; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *contra*, *King* v. *State Mut. Fire Ins. Co.*, 54 Am. D. 683.

[3] *Commercial Union* v. *Lister*, 43 L. J. Ch. 601; 9 Ch. App. 483.

[4] *Nichols* v. *Scot. Union & Nat. Ins. Co.*, reported 14 R. Appendix, p. 1094; *Phoenix Ins. Co.* v. *Erie &c. Co.*, 117 U. S. 312, 321; *Kernochan* v. *New York Bowery Ins. Co.*, 17 N. Y. 428; *Nelson* v. *Brook Mut. Fire Ins. Co.*, 3 Am. St. R. 308; *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454.

owner of the vessel in fault [1]. In such a case the insured could not sue himself, and therefore there is no right of action to which the insurer could claim an assignment.

The effect will be the same even in the absence of any provision as to insurance where the mortgage falls within the provisions of the Conveyancing Act of 1881 [2].

It has been held that where the mortgagor is thus entitled to the benefit of the mortgagee's insurance, and procures in addition other insurance upon his interest as owner, the two insurances constitute, as regards the owner, double insurance, and the insurers will contribute rateably to make good the loss [3].

8. *No duty to disclose agreement affecting right of subrogation.—Special stipulation for subrogation.*—In general a mortgagee or other creditor who insures independently of the owner is not bound to disclose the existence of agreements with the owner which affect the insurer's right of recourse, although they may materially increase his ultimate liability. Where, however, such agreements are made the subject of special inquiry, or where the insured is otherwise made aware that the premium is calculated upon the hypothesis that the insurer will be entitled to an assignment on payment, a duty of disclosure will arise [4].

In some policies a special stipulation for subrogation is inserted, and, where that is the case, the insurer is not bound to make good the loss if the insured has contracted away his right to make good the stipulation [5].

9. *Insurer of creditor's interest has not same rights as surety for debt.*—Although a creditor's insurance operates indirectly as a guarantee of the debt, his insurer is not in the position of a surety, and does not acquire all the rights of a surety. A surety's guarantee would be cancelled by a release of the debtor by the creditor, or by a surrender of collateral securities at any time; but unless the release is granted or the surrender made after a loss, they do not afford a valid defence to an insurer. The insurer's rights of recourse against the debtor and against the security only emerge upon the happening of a loss, and arise not from an implied term of a contract, as in the case of a surety, but as an incident of the principle of indemnity. The loss for which the insurer is ultimately liable is increased by the insolvency of the debtor, and by the existence

[1] *Simpson* v. *Thompson*, 3 App. Cas. 279.
[2] 44 & 45 Vict. c. 41, sec. 23, subsecs. 3 and 4.
[3] Nichols, *supra*; contrast *Scottish Amicable* v. *North Abs. Co.*, 11 R. 287; and see also *Jackson* v. *Mass. Mut. Fire Ins. Co.*, 34 Am. D. 69; *Carpenter* v. *Prov. Wash. Ins. Co.*, 16 Pet. (S. Ct. U. S.) 495; 2 Am. L. Cas. 865.
[4] *Tate* v. *Hyslop*, 15 Q. B. D. 368; *Phoenix Co.* v. *Erie Co.*, 117 U. S. 312, 326; *Jackson Co.* v. *Boyeston Co.*, 52 Am. R. 728; *contra*, *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546.
[5] *Foster* v. *Van Reid*, 26 Am. R. 544; *Kernochan* v. *N. Y. Bowery Ins. Co.*, 17 N. Y. 428.

of prior incumbrances upon the security; but, as we have seen, the insurer is not entitled to rely upon these remedies being kept open for him, and they are not circumstances which as a rule are taken into account in estimating the risk or fixing the premium [1].

10. *Separate insurance by mortgagor and mortgagee.—No contribution between insurers.—Adjustment of loss, and rights of insurers* inter se.—If the mortgagor and mortgagee have insured the security for their separate interests the insurances do not constitute double insurance, nor is the loss settled on the principle of contribution. The whole loss is borne by the mortgagor's insurer. The reason of this rule is that the interests insured are not the same, and that the insurers, as regards their mutual rights, stand in the place of the insured. The mortgagee has a remedy in the event of a loss upon the personal obligation of the mortgagor, and to this remedy his insurer is entitled upon payment of the sum due under the mortgage. At the same time the mortgagor, who is called upon to pay up the debt on the destruction of the security, is entitled to throw this liability upon his insurer as part of the loss. To the extent of the charges upon the property the mortgagor's insurance is therefore practically a reinsurance of his personal liability for the debt [2].

It is not, however, a defence to a claim upon the mortgagee's policy that the remedy which falls to be assigned to his insurers is of no value owing to the insolvency of the mortgagor, even where the whole amount of the fire damage has already been made good to the estate by the mortgagor's insurer. We have seen that the mortgagee has no lien upon this sum, and can only claim for his debt *pari passu* with the other creditors of the insured. It has been objected that to allow the mortgagee to recover in such a case from his own insurer would violate the principle of indemnity, inasmuch as more would be recovered upon the two policies than the damage done by fire. This anomaly is explained by the fact that the risk covered by the two policies is not the same. The contingency against which the mortgagor's policy provides is a loss by fire, while the mortgagee's policy provides against the concurrence of two events, a loss by fire and the insolvency of the mortgagor. A primary liability arises on the first contingency, but ultimate liability depends on the concurrence of both [3].

11. *Measure of mortgagee's loss.—How affected by* (1) *Reinstatement of security*, (2) *Solvency of debtor*, (3) *Sufficiency of remaining security.*—If the premises injured by fire have been reinstated by the owner

[1] *Insurance Co.* v. *Stinson*, 103 U. S. 25 at p. 28.
[2] *N. B. Ins. Co.* v. *L. L. & Globe Ins. Co.*, 5 Ch. D. 569, 583; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560.
[3] *Westminster Fire Office* v. *Glasgow &c. Soc.*, 14 R. 947, 965; 15 R. (H. of L.) 89; 13 App. Cas. 699.

or by prior mortgagees, such reinstatement will, in general, be a defence to a claim by the mortgagee; but the ground of the defence is that the insured has suffered no loss, and it is not valid if it be shown that, notwithstanding the reinstatement, the value of the security is substantially impaired by the fire [1].

It is not a defence to the insurer that the debtor is solvent and that the insured may make good his personal claim against him. The insured is not bound to exhaust his remedies against third parties before claiming indemnity from his insurer [2].

It has not been decided in this country whether it is a valid defence that the security, although diminished in value by the fire, is still sufficient to cover the mortgage debt, and the American authorities upon the question are not unanimous. In the leading case the defence was rejected, and it was held that a mortgagee who has insured his separate interest is entitled, upon assigning his mortgage to his insurer, to claim the full amount insured wherever the security has been materially damaged by fire. The ground of judgment was that an insured is not bound to resort elsewhere than to his policy for indemnity, and that this principle, recognized as regards the mortgagee's personal claim against the debtor, is equally applicable to his remedy upon the mortgaged property [3].

The competing theory is that a mortgagee insures not the ultimate safety of the whole property, but its capacity to pay the mortgage debt, and that he can only claim under his policy the balance of his debt which his security remaining after the fire is insufficient to cover. As a consequence of this view it was held that, where insurance is effected by a mortgagee upon his special interest, the existence of prior incumbrances is material to the risk and must be disclosed [4].

The two theories may be illustrated by the following case. Suppose that property of the value of £1,000 is mortgaged to *A* for £500 and to *B* for £500, and that *A* and *B* insure in respect of their mortgage interests to the full amount of their debts. Suppose that the security is injured by fire to the extent of £500. If *A*'s mortgage be prior to *B*'s, *A*'s insurer upon the theory last explained would not be liable to him, because the value of the security is still sufficient, if realized, to pay his debt. *B*'s insurer upon the same

[1] *Westminster Fire Office* v. *Glasgow Prov. Ins. Soc.*, 13 App. Cas. 699, per Lord Selborne, pp. 712, 713; *Matheeson* v. *Western*, 10 Fr. Can. Rep. 8, cited Porter, Laws of Ins., p. 234.

[2] *Collingridge* v. *Royal Exch. Ass.*, 3 Q. B. D. 173; *Hancox* v. *Fishing Ins. Co.*, 3 Sumner 132 (American).

[3] *Excelsior Fire Ins. Co.* v. *Royal Ins. Co. of Liverpool*, 14 Am. R. 271, where all the authorities are reviewed, pp. 279, 283.

[4] *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546; *Carpenter* v. *Prov. Ins. Co.*, 16 Peters, 495; 2 Am. L. Cas. 865.

theory would be liable to him for £500 because his debt is wholly uncovered. On the first theory *A* and *B* would each be entitled to claim the whole sums insured, because *A*'s security is less valuable by its margin of £500 than it was before the fire, while *B*'s debt is, as before, entirely uncovered, *A*'s insurer having been subrogated to *A*'s preferable rights upon the security. Upon either theory the actual loss of £500 is ultimately made good by the insurer of the postponed creditor.

12. *Insurance by prior and subsequent incumbrancers.—When valid.—No contribution among insurers.*—Where several creditors hold liens over the same goods each may insure independently of the owner or of other creditors, and as the interests protected are distinct, the principle of contribution is not applicable to the settlement of the losses. The loss to each independent interest must be made good by the insurers of that interest[1]. If, however, the property is burdened to its full value, a subsequent lien, where it can be validly acquired, does not entitle the holder to recover upon a policy of insurance[2]. The loss to the holder of the security in such circumstances is the chance that, by the discharge of prior incumbrances, his security may become available, but this is a mere expectation, of which the realization is uncertain apart from the perils insured against, and has no insurable value[3].

Upon the same principle it has been held that subsequent incumbrancers cannot recover the rent of the property mortgaged, where it is included in the bonds of prior incumbrancers, and insured and recovered by them[4].

13. *Clause of contribution does not apply to insurance by other incumbrancers—even if owner made party to policies.*—In the *Scottish Amicable* v. *Northern Assurance Company*[5] the suit was brought upon a policy of insurance issued to the holders of prior bonds over heritable subjects in Scotland and to the owners of the subjects. The policy ran in the name of the bondholders and of the owners 'jointly and severally and in reversion,' and contained the usual contribution clause providing that if at the time of any loss occurring to the property thereby insured there should be any other subsisting insurance 'whether effected by the insured or any other person covering the same property,' the insurer should only be liable to contribute his rateable proportion of the loss. It appeared that at the time of

[1] *Godin* v. *London Assurance*, 1 Burr. 490; *Scottish Amicable* v. *Northern Ass. Co.*, 11 R. 287.
[3] Arnold, p. 118 et seq.
[2] *Lucena* v. *Crauford*, 3 B. & P. 75; 2 B. & P. N. R. 269; 6 R. R. 623; *Routh* v. *Thompson*, 11 East, 428; 10 R. R. 539; Arnold, p. 99.
[4] Westminster Fire Office, 15 R. (H. of L.) 89; 13 App. Cas. 699.
[5] 11 R. 287.

the loss the holders of postponed bonds held policies of insurance upon the same subjects, and that the owner was made a party, in respect of his reversionary interest, to their policies as well as to those issued to the prior bondholders. The main question in the case was whether the latter policies fell within the terms 'other insurance upon the same property.' It was held that the other insurance contemplated was a second insurance of the same interest in the same property, and that, as the interests primarily insured by the different policies were the separate interests of the bondholders, the provision did not apply. The words 'the same property' were held to mean the same proprietary interest, and the effect of the provision was thus merely to express the ordinary rule as to contribution between insurers of the same interest[1]. The insurers of the prior bondholders were therefore not entitled to limit their contribution to the fractional part of the fire damage represented by the ratio of the sum insured by them to the aggregate sums insured upon the security, but were bound to make good their contract of indemnity as if no other insurance existed upon the same subjects. The insurers under the different policies were agreed that the loss should be settled as if all the policies had been issued to the owner, and that they should contribute rateably to the fire damage and pay the amount into a common fund which should stand in place of the security destroyed. The arguments in favour of this view will be found expressed in the judgment of Lord Young, who dissented from the majority of the Court[2]. The majority rested their judgment upon the ground that the prior bondholders by whom the action was brought had no concern with other insurance to which they were not parties, and no right of action except under their own contract of indemnity.

14. *Insurance by subsequent incumbrancers, when valid.—Measure of loss.—Effect of payment by other insurers to prior incumbrancers.*—The decision in *The Scottish Amicable* v. *Northern Assurance Company* case was inferentially affirmed by the House of Lords in the subsequent case of the *Westminster Fire Office* v. *Glasgow Provident Investment Society* already cited[3].

The main question in the latter case was whether the postponed bondholders, by whom the action was brought, could recover upon their policies in respect of the same injury by fire to the bonded subjects. The policies held by the prior and postponed bondholders were issued by different companies, but they

[1] Cf. *N. B. and Mercantile Ins. Co.* v. *L. L. & Globe Ins. Co.*, 5 Ch. D. 569; *Etna Fire Ins. Co.* v. *Tyler*, 30 Am. D. 90.

[2] 11 R. 295.

[3] 14 R. 947; 15 R. (H. of L.) 89; 13 App. Cas. 699.

were in the same terms, and covered the owner's reversionary right. They contained, in addition to the clauses already narrated, an option to reinstate and an allocation of the sums insured over the different insurable items of the security, which consisted of a mill and machinery, and the site upon which the mill stood. The pursuer's postponed bonds over the subjects amounted to about £800. The prior bonds amounted to over £8,600; but the value of the security, inclusive of the site, before the fire, was, according to the admission of the parties, sufficient to cover all the bonds. As the result of the judgment in the previous case the prior bondholders had recovered from their insurers, who had elected to reinstate, a sum sufficient for that purpose, fixed by arbitration at £5,668. This sum had not as matter of fact been expended in reinstatement, but had been applied by the prior bondholders in reduction of their debt. The value of the site and salvage of the mill and machinery after the fire was, at the lowest estimate, (that of the pursuer's valuators,) £3,500, this being the sum the subjects as they stood would have brought if sold in the market. The defenders' valuation was higher, but they admitted that the value of the site and salvage after the fire was less than £8,600, the amount of the prior bonds[1]. The pursuer's right to recover in these circumstances was sustained by the Court of Session and affirmed on appeal by the House of Lords.

In the Court below the majority of the consulted judges rested their judgment upon the admission that the damaged subjects did not in fact afford as good a security for the diminished debt as the entire subjects afforded for the whole debt before the fire, thus affirming the principle which is established by a preponderance of authority in America[2]. The same view was taken by the House of Lords, but the ground of judgment is less accurately made to rest upon the ground that the value of the security after the fire was insufficient to meet the balance due upon the prior bonds, and that the pursuer's security was therefore not only deteriorated but wholly destroyed as a consequence of the fire. The latter part of this proposition does not seem to be justified by the facts of the case so far as they appear upon the face of the Reports. The figures given above show that the balance due to the prior bondholders, after the payment made to them by their insurers, was, on a rough estimate, £3,000; while the reduced value of the subjects at the lowest estimate was £3,500, thus not only covering the balance due upon the prior bonds but leaving a margin of £500 available

[1] 13 App. Cas. 699, pp. 700 and 701.
[2] *Excelsior Fire Ins. Co.* v. *Royal Ins. Co.*, 14 Am. R. 271; *supra*, p. 56.

to meet the pursuer's bond of £800. The pursuer's bond was therefore uncovered to the extent of £300. It does not appear from the report whether the security was actually realized after the fire, or how the proceeds were dealt with; but however the facts may stand, the judgment of the House of Lords does not meet the question, which appears to have been raised by the facts, of a creditor's right to recover where his security is not wholly destroyed, but is so reduced in value by the fire as to cover only a part of the debt secured. Nor can any principle be deduced from the case as to the amount which the secured creditor can, in the case of such partial deterioration, recover under his policy of insurance. The question of amount, or the effect of the allocation of the sum insured upon the different items of the security, was not argued to the Court, and the actual sum of £230, to which the pursuers were ultimately found entitled, seems to have been arrived at by arrangement between the parties by a process which estimated the loss on each item separately and measured by the sum required to reinstate, and which was, therefore, in conflict with the principle of estimation of the loss upon which the right of the pursuer to recover at all rested[1]. The pursuer's proper course, in accordance with the latter principle, would have been either to claim the whole sum insured under offer to assign to his insurer any rights he might have in the security by which the loss might be reduced, or to realize the security so far as available to him after the fire, and claim the balance of the debt remaining due[2].

It ought also to be noticed that had the same method of settlement been applied in the case of the prior as in the case of the postponed bondholders, the payment to the prior bondholders, although upon an independent contract, might have been a valid defence to the claim by the postponed bondholders upon their policies. The ground of the defence would have been that they had sustained no loss, inasmuch as the diminution in value of their security occasioned by the fire was necessarily exactly equivalent to the reduction of the preferable debt with which it was burdened. The fallacy underlying the application of this argument to the case, which was strongly insisted on by the minority of the consulted judges in the Court below, was the assumption that the prior bondholders had received a full indemnity in the payment to them by their insurers of the sum required to reinstate the premises. As shown by Lord Selborne, this is a conclusion which is not generally admissible. The value of the salvage of

[1] 14 R. 957, 984.

[2] *Excelsior Ins. Co.* v. *Royal Ins. Co. of Liverpool*, 14 Am. R. 271; *Smith* v. *Columbia Ins. Co.*, 55 Am. D. 546; *supra*, p. 56.

a wrecked building, or of machinery damaged by fire, for the purpose of reinstatement is obviously greater than the price they would fetch as old stone or iron. The amount of the loss under a contract of indemnity is always a question of fact, and there is no hard and fast rule by which it is to be estimated. In the United States the view taken is that where the insurers, after a loss, elect to exercise an option to reinstate, the contract becomes a building contract, and the pecuniary measure of the insurer's obligation has no necessary relation to the sum for which he would be liable under a contract of indemnity [1].

15. *Mortgagor's rights under joint insurance.—No subrogation.—Aggregate amount recoverable, how limited.*—The question of the owner's rights under the joint insurance was not directly raised in the case of the Westminster Fire Office, nor the question whether the insurers upon payment to the bondholders could, as in the case where the creditor's interest alone is covered, have demanded an assignation to their rights in the security, or to their personal claim against the debtor. It would seem a conclusive answer to such a claim that the owner was insured as well as the creditor, and that, as against the insurer, he was entitled to a credit in respect of the money received under the policy [2]. The joint insurance was in effect a collateral security for the debt, the proceeds of which the creditor was bound to apply in reduction of the debt. The doctrine of subrogation would, therefore, not be applicable, because in so far as the debt was met by the payment under the policy, it was extinguished, and there was no right competent to the creditor to which the insurer could have asked an assignation. At the same time it would be at variance with the fundamental principle of the contract that the owner should, as the result of the transactions arising out of the loss, be more than fully indemnified for the injury to his interest. This would clearly be the case if the amount paid to his creditors exceeded the damage done to the security by the fire. The anomaly would be met if the owner were regarded as holding the salvage of the security to the extent of this excess in trust for the insurers, and subject to their equitable lien, upon the principles laid down in *Castellain* v. *Preston* [3]. It is also clear that if the excess so recoverable were apportioned among the insurers of the different creditors in the proportion of the indemnities paid by them, their ultimate liability would be the same as if the loss had been originally adjusted upon the contribution principle [4].

[1] *Morrell* v. *Irvine Fire Ins. Co.*, 88 Am. D. 396. [2] 14 R. 967.
[3] 11 Q. B. D. 380.
[4] *Supra*, section 13. For Actuaries the following proof will be sufficient. Suppose

The final result of the case would seem to be to establish the following propositions: (1) That a mortgagee or other incumbrancer has an insurable interest in the security notwithstanding the existence of prior incumbrances, provided the aggregate amount of the incumbrances is not greater than the value of the security. (2) A subsequent incumbrancer insuring his interest will have a right to recover in the event of a loss where the security is so reduced in value by the fire as to leave his debt uncovered. (3) This reduced value is the market value of the site and salvage of buildings, and not the value for the purposes of reinstatement, which is in general much greater. (4) Insurance by creditors of their independent interests is not to be treated as double insurance by the owner, in respect that he is made a party to each of the creditors' policies for his reversionary interest.

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A and *B*, two creditors, hold liens to the extent of a and b and insure to the full value of the liens. If d be the damage actually done by the fire to the security, and if $a+b=d+e$, e is the excess recoverable in the hands of the owner by the insurers of *A* and *B*. The sum represented by e falls to be divided between the insurers of *A* and *B* in the proportion of a to b, the sums they have paid in the first instance. *A*'s insurer, on this principle, pays ultimately

$$a-\frac{a}{a+b}e=a-\frac{a}{a+b}(a+b-d)=\frac{a}{a+b}d,$$

which is the amount he would have had to pay originally upon the contribution principle.

SCENES IN COURT FROM THE YEAR BOOKS.

'HOW one would have liked to see one of those ancient Courts under the Plantagenets!' was the remark of Wills J. at a meeting of the Selden Society—on an eyre say at Winchester or Hereford,—the King's Justices, the stout old Sheriff with his posse, the bailiffs, the knights, the jurors, the serjeants of the law 'ware and wise' in their hoods, the appellees and prisoners, and all the motley crowd of suitors and spectators. Where be they all now? They live forgotten in the dusty folios of the Year Books—those Year Books rich with the spoils of time to the student of our legal history, to the ordinary reader an arid waste of legal technicalities. Yet here and there, diversifying the dreariness, we come upon some little green oasis of human interest, a lively wrangle between counsel, a glimpse of national manners, an outbreak of testiness on the part of the Judge, it may be a 'good round mouth-filling oath' such as Queen Elizabeth in her best vein could swear, according to Mr. Froude. A Scotch young lady lamenting her brother's addiction to the bad habit of swearing added apologetically, 'but nae doubt swearing is a great set aff to conversation:' and no doubt swearing from the Bench is very effective at times. So at least the King's Justices thought, for they swear in the Year Books with the force and freedom of Commodore Trunnion. 'Do so in G—'s name,' 'By G— they are not,' 'Go to the devil' (Alez aut grant diable)—this to a bishop—are among the flowers of judicial rhetoric. When Hull J. flew into a passion at the sight of a bond in restraint of trade and swore 'per Dieu si le plaintiff fuit icy, il irra al prison' (2 Hen. V. fo. 5, pl. 26), he was only keeping up the tradition of the Bench. Counsel swear by St. Nicholas, which has an appropriateness of its own (21 & 22 Ed. I. Br. Chr. 31, iv. 480).

> 'A good and virtuous nature may recoil
> In an imperial charge,'

says Shakespeare in 'Macbeth.' The Justices felt they presented the King's person and were naturally inclined to be a little absolute in swearing and laying down the law. Cases did not then embarrass them. 'Never mind your instances,' says Metingham J. to counsel who was citing some previous decision (20 & 21 Ed. I. Br. Chr. 31, iv. 80). Here is a little scene, suggestive of the Court in *Bardell* v. *Pickwick*.

Berriwick J. (to the Sheriff). 'How is it you have attached these

people without warrant? For every suit is commenced by finding pledges, and you have attached though he did not find pledges.'

The Sheriff. 'Sir, it was by your own orders.'

(Mem. by Reporter.) 'If it had not been, the Sheriff would have been grievously amerced. Therefore take heed.' (21 & 22 Ed. I. Br. Chr. 31. iv.)

On another occasion a jury was shuffling, on a question of legitimacy.

Roubery J. (to the Assize). 'You shall tell us in another way how he was next heir, or you shall remain shut up without eating or drinking until to-morrow morning.' (21 & 22 Ed. I. Br. Chr. 31, iv. 272.) This quickly brought the right answer.

Counsel do not escape unscathed.

Hertford J. (to Counsel). 'You do bad service to your client. You only take care to get to an averment. You have pleaded badly.' (21 & 22 Ed. I. Br. Chr. 31, iv. 180.) This must have been trying for poor Mr. Phunky. The following is more racy. In a writ of Monstravit de Compoto, &c., Hampone (counsel) begins in this seemingly inoffensive manner. 'Whereas he supposes by his writ that he has nothing whereby he may be summoned or attached to render this account we tell you that he has assets in T.,' &c.

Hengham J. 'Stop your noise (Lessez vostre noyse) and deliver yourself from this account, and afterwards go to the Chancery and purchase a writ of Deceit, and consider this henceforth as a general rule.' (30 & 31 Ed. I. Br. Chr. 31, v. 6.) Let us hope this last statement was lucid to the practitioner of the day. The words at the beginning certainly seem rude, but perhaps they are only what a counsel of that day calls 'curial words' (paroles de la Court). 'Every word,' he says, 'spoken in Court is not to be taken literally. They are only curial words' (20 & 21 Ed. I. Br. Chr. 31, iii)—a remarkable anticipation of a certain celebrated occasion when the Pickwickian sense of the word 'humbug' was explained.

However, Counsel were able to take care of themselves then as now.

'Sir' (this was the mode of addressing the Court). 'Sir,' says Toudeby, 'we do not think that this deed ought to bind us, inasmuch as it was executed out of England' (at Ghent).

Howard J. 'Answer to the deed.'

Toudeby (counsel). 'We are not bound to do so for the reason aforesaid.'

Hengham J. 'You must answer to the deed, and if you deny it then is it for the Court to see if it can try,' &c.

Toudeby. '*Not so did we learn pleading.*' (30 & 31 Ed. I. Br. Chr. 30, ii. 72.) This probably in an audible aside.

The independence of the Bar is emulated by the Reporters. One Robert was charged with harbouring an outlaw. The outlaw procured a charter of pardon from the King, and Robert contended that this purged his offence Berriwick J. was like Dr. Johnson: his pistol having missed fire he knocks down his opponent with the butt end of it. 'Robert, pay your fine to the King, for you cannot deny you harboured him, and that was a great trespass against the King,' &c., &c.

'Note, the Justice did this rather for the King's profit than in accordance with the law, for they gave this decision *in terrorem*.' (30 & 31 Ed. I. Br. Chr. 30, i. 506.) Brave reporter! This is better than surreptitiously keeping a drawer like Campbell for Ellenborough's bad law. Later on a reporter—was it the same?—mentions a ruling with approbation as 'correct.'

The proper construction of the Statute of Westminster came in question.

Hengham J. 'Do not gloss the statute. We understand it better than you, for we made it, and it is often seen that one statute extinguishes another.' Often! we should think so. Counsel of course collapsed. Still, the learned judge failed to appreciate the distinction of intention and intendment. The dictum contrasts unfavourably with the modesty of the late Lord Justice James in referring to a previous decision of his own, 'which,' he would say, 'is an authority, though I joined in it.'

Technicality in these early cases is rampant. The rule is, 'Find a flaw, however microscopic, in the writ, and pray for judgment.' In a 'Petit Cape,' Agnys was written instead of Agnes. Asserby (for Agnes) thought thereby to upset the whole process, and he said, 'Sir, he sued the Petit Cape against Agnys, whereas he ought to have sued it against Agnes. Judgment of the bad writ.'

Metingham J. 'It is not the fault of the party, but it is the fault of our clerk, and that fault will be amended by us, and so we tell you that the process is sufficiently good, and you are not courteous in speaking in that fashion.'

We find Hengham J. obliged, on another occasion, to observe, 'That is a sophistry, and this place is designed for truth.' (30 & 31 Ed. I. Br. Chr. 31, v. 20.) No applause is recorded however as following this excellent sentiment. Brumpton J. has even to admonish counsel, 'See that there is no deceit in your pleadings.' (30 & 31 Ed. I. Br. Chr. 30, v. 362.) Craftiness in pleading was the order of the day, like the subtleties of the Schoolmen. Indeed Durand, a thirteenth-century writer, recommends advocates to adopt what he calls 'a vulpine simplicity.' 'You have admitted this, God help you,' says the Court on one occasion.

On another, counsel had made a slip in vouching the wrong person.

Robert (on the other side). 'We pray judgment of this bad voucher.'

Warwick (who had made the slip). 'Leave to imparl *for God's sake, Sir.*'

(Mem. by Reporter.) 'He obtained it with difficulty.' (21 & 22 Ed. I. Br. Chr. 31, iv. 492.)

This excited state of counsel was not altogether professional keenness. Amercement was the common consequence of an unsuccessful suit. People are always being amerced for false, that is unfounded claims, sometimes sent to prison. Witness the following sad tale of an attorney. It was a case of a claim to land, and alleged default in attending on a given day. *B*'s attorney held to the default. The Justice asked on what day the default was made. The attorney answered that it was on the first day, and it was found that it was on the second day, and afterwards (one or two or three days afterwards) the attorney came and said that it was on the second day, and he held to the default as before.

Metingham J. 'My fine friend (bel amy), the other day when the worthy man was ready to make his law you said that the default was made on the first day, and afterwards you came and said that the default was made on the second day, and thus you vary in your words and deeds: this Court doth adjudge that you take nothing by your writ, but be in mercy for your false plaint.' (21 & 22 Ed. I. Br. Chr. 31, iv. 460.)

A Prior had hung a thief (who had confessed), and got himself into hot water about it.

Spigournel J. 'Call the Prior.'

The Prior came.

Spigournel J. 'Do you claim infangthef and utfangthef?'

Hunt (counsel). 'Sir, he claims to have infangthef.'

Spigournel J. 'Was the felony committed within the limits of your franchise?'

Hunt. 'No, Sir.'

Spigournel J. 'Where then?'

Hunt. 'Sir, we do not know.'

Spigournel J. 'Now, Sir Prior, do you mean to hold a plea in your Court of a felony committed out of the limits of your franchise, when you claim only infangthef?'

(Counsel for the Prior turned and doubled, but to no purpose.)

Spigournel J. (to the Prior). 'You have well heard how it is recorded that you went to judgment on him who acknowledged himself a felon without presentment by the Coroner who can bear record, whereas your Court is not a Court of record, and this you

cannot deny: attend judgment on Monday.' (30 & 31 Ed. I. Br. Chr. 30, i. 500.)

What befell the unlucky Prior does not appear. The Crown was getting very strict, and rightly, about these franchises.

Default of appearance was a common incident then as now, perhaps commoner, owing to the difficulties of travelling, as the following illustrates. It was a case of a Writ of Right between Roger de Pengerskeke, demandant, and John de Leicester and Joan his wife, tenants. On the day of the return of the writ to cause the four knights to come and choose the Assize, John did not turn up and the default was recorded. 'On the next day John came to the bar and answered for his wife as attorney, and for himself in his own person, and said that the default ought not to hurt him because he was hindered by the rising of the waters.

The demandant's Attorney. "Where were you hindered?"

The Tenant. "At Cesham."

Mallore J. "At what hour of the day?"

The Tenant. "At noon."

The demandant's Attorney. "And we pray judgment if from that time he could be here at the hour of pleading, since it is 15 leagues away from here. Besides he began his journey too late."

The Tenant. "I travelled night and day."

Mallore J. "What did you do when you came to the water and could not pass? Did you raise the hue and cry and the menée, for otherwise the country would have no knowledge of your hindrance?"

The Tenant. "No, Sir. I was not so much acquainted with the law, but I cried and hullooed" (jeo criay e brayay).

The demandant's Attorney. "Judgment outright of his default, and we pray seisin of the land."

Mallore J. "Will you accept the averment that he was hindered as he says?"

The demandant's Attorney. "If you adjudge so, Sir, but since he has admitted that he did not raise the menée, judgment of his admission."

Hengham J. "Keep your days until to-morrow." And on the morrow they were adjourned to the Quinzein of Trinity, which to some seemed strange.' (30 & 31 Ed. I. Br. Chr. 30, v. 122.) Not to us, familiar with the law's delay. But space is limited, and we must drop the curtain.

EDWARD MANSON.

THE DETERMINATION OF THE MOWBRAY ABEYANCE.

SEVERAL points of great interest to the student of Peerage law were raised in the Mowbray and Segrave case decided in 1877. But on the present occasion I do not propose to call attention to more than one—the alleged determination, 'in some way or other,' in favour of the Howard co-heir, of the abeyance into which the baronies of Mowbray and Segrave had fallen in the fifteenth century.

Anne, the child-heiress of the Mowbrays, Dukes of Norfolk, was an infant of six years old at her father's death (1475) and affianced to a son of Edward IV (one of 'the princes in the Tower'), who was thereupon created Duke of Norfolk. She died in tender years, leaving the succession to the baronies and vast estates of her house open to her relatives, Isabel and Margaret, wives respectively of James Lord Berkeley and Sir Robert Howard. Now these ladies were the daughters of the first Duke of Norfolk, son of John Lord Mowbray, by his marriage with the daughter and heir of John Lord Segrave, whose wife Margaret, Countess of Norfolk, was the heiress of Thomas 'de Brotherton,' son of Edward I, and Earl Marshal. Thus the death of the little heiress proved the means of a vast accession to the fortunes of the house of Berkeley, while it virtually founded those of the house of Howard. The Mowbray dignities were divided between them, Lord Berkeley being created Earl of Nottingham and Lord Howard Duke of Norfolk the same day (June 28, 1483). It is a singular circumstance that the seniority of the heiresses seems to be undetermined, Ulster declaring Lady Howard to be the elder, while the *Complete Peerage* of G. E. C. assigns that position to Lady Berkeley, as, apparently, did Dugdale. But in any case the Berkeleys had an equal share in the representation of this illustrious line, which makes it the more strange that the Howards should have been tacitly allowed to monopolize it as they virtually have done. In 1777 this representation, with all that it involved, passed away from the Howards to their heirs-general, the Lords Stourton and Petre; and in 1882 the share of the Berkeleys similarly passed to their heir-general Mrs. Milman, now recognized as Baroness Berkeley. Thus, in 1877, there were three co-heirs to the house of Mowbray, namely the *de jure* Earl of Berkeley (whose right to that title has been confirmed by the recent decision, but

who never assumed it), who inherited one moiety, and the Lords Stourton and Petre, who shared the other. The Committee for Privileges decided, however, that the abeyance of the Mowbray and Segrave baronies had been determined in favour of the Howards 'previously to the reign of Queen Elizabeth,' and believed that it was done by Richard III.

The first point in this decision that invites close attention is its bearing on the doctrine of abeyance. The best authorities have agreed in placing the earliest undoubted case of the determination of an abeyance by the Crown so late as 1660, the previous cases being all more or less doubtful. The Mowbray decision, however, carried back the practice *per saltum* to the days of Richard III! But far more extraordinary, and indeed revolutionary, was the view taken of the evidence in proof of the abeyance being determined in favour of the Howard co-heir. In the Windsor case (1660) the determination was effected by formal patent, but in that of Ferrers of Chartley (1677) merely by the issue of the writ, which has since been the usual practice. But in the Mowbray case there is no evidence how or even when the abeyance was determined.

Down to the time of Lord Stourton's claim the position of the question was this. The barony of *Segrave* (though the Berkeleys had constantly included it among their titles) was believed to be still in abeyance. Mr. Fleming, Lord Stourton's own counsel, had himself admitted in the Scales case (p. 26) that the barony of Segrave is in abeyance 'between Lords Stourton and Petre . . . and the heir of the late Earl of Berkeley.' So universal was this belief that a modern barony of Segrave was created in favour of the Fitzhardinge Berkeleys (1831). As to *Mowbray*, there were doubts. Mr. Courthope, in his *Historic Peerage* (1857), referring to the Mowbray summons of 1640, held that 'it may reasonably be doubted whether this writ of summons did not create a new barony instead of affecting the abeyance of the ancient dignity' (p. 340). But, in any case, no other evidence than this writ, for the determination of the abeyance, was supposed to exist. In Lord Stourton's original petition it was accordingly claimed 'that the Barony of Mowbray continued in abeyance . . . until the year 1640, when King Charles the First was pleased to determine the abeyance by summoning Henry Frederick Howard . . . as Lord Mowbray.' This allegation, of course, ignored the difficulty that the party to whom the writ was issued was not a co-heir to the dignity at the time.

The claim, however, was subsequently altered in consequence of the discovery of Letters-missive from Richard III, including the baronies of Mowbray and Segrave in the Duke's style. In Lord

Stourton's 'additional case' it was confidently urged by his counsel that these Letters proved the determination of the abeyance [1].

These Letters, on which Mr. Fleming insisted so strenuously throughout, were, with singular eagerness, accepted as proof by the Committee. I append the relevant extracts from their judgment:—

LORD CHANCELLOR.

'As to the abeyance of the Segrave barony, it appears to me that the Letters-missive of the 2nd of Richard III, signed by the King, would of itself be sufficient evidence that in some way or other the abeyance had been terminated by the Sovereign.'

LORD O'HAGAN.

'As to the abeyance, I should say that the Letters-missive of King Richard III are of themselves, without any question being raised as to the admissibility of the garter-plates in evidence, quite sufficient to prove the determination of the abeyance of the baronies. The King recognizes the determination of the abeyance; . . . and however it may have been accomplished . . . I think the evidence with regard to the determination of the abeyance of the baronies is perfectly sufficient.'

LORD BLACKBURN.

'If it [the determination] is done by a document, under the hand of a Sovereign, by his sign manual, that is quite sufficient. Now here is evidence that the abeyance was so terminated. . . . I think myself, if it were necessary, it [the Letters-missive] should be construed as operating as an original grant under his hand to determine the abeyance; for I am not aware that the King could do more. . . . I think the Letters-missive of King Richard III are quite conclusive upon the matter.'

LORD CHANCELLOR.

'I myself do not accept that [the garter-plates] as evidence with regard to the determination of the abeyance, but I think the other evidence of the determination of the abeyance is satisfactory, namely the Letters-missive of King Richard III.'

These extracts sufficiently establish the Committee's acceptance of Mr. Fleming's contention that 'the abeyance of the baronies . . . was determined in favour of John Howard, the first Duke of Norfolk [2],' and that this determination, proved by the Letters-missive, 'forms the sole ground [3]' for the subsequent user of the titles.

Let us first consider the consequences of the principle thus laid down. It revolutionizes the doctrine of abeyance, as hitherto

[1] See Additional Case, No. 27 (p. 9), and the note thereupon:—'It is confidently submitted on the part of the Petitioner that the abeyance . . . was determined in favour of John Lord Howard Duke of Norfolk shortly after her [Anne's] death, and before the 24th of September, 1484 [the date of the Letters-missive].'

[2] Special Case, p. 290. [3] Ibid., p. 26.

understood, in the direction aimed at by Mr. Fleming in the Scales case, and thus opened the door to a new series of claims. The Leicester patent of 1784, for instance, can now be invoked as determining (or proving the determination of) the Bourchier abeyance; and other recognitions by the Crown in formal instruments, however erroneous, can now be similarly interpreted.

Incidentally, it may here be added that, according to Lord Stourton's 'original case' (p. 11), the Duke of Norfolk received, Feb. 24, 148$\frac{3}{4}$, a general pardon 'describing him by all the titles and names which could be attributed to him,' but the Pardon Roll reveals that the baronies of Mowbray and Segrave are not to be found among them. So too with his patent of creation on June 28 preceding. This then narrows the date of the alleged determination to February—September 1484. And though the time and manner of such determination, at this very early date, should have been clearly established, we have only the Lord Chancellor's belief that it took place 'in some way or other' on some unknown occasion.

Assuming, however, that Mr. Fleming was right, and that, in the words of the petitioner's case, 'the abeyance . . . was determined in favour of John Howard Duke of Norfolk previously to the 24th of September,' 1484, what evidence is there of the user of the titles by the Howards? The petitioner was not able to adduce one till 1563, when the funeral certificate of the Duchess of Norfolk styles her husband 'Lorde Mowbray Segrave and of Brews' (p. 265). And this was dismissed, in his judgment, by Lord Blackburn (who oddly seems to have imagined that it was a coffin-plate inscription [1]) as 'no evidence at all.' With that exception the petitioner adduced no evidence of user till the garter-plate of 1611 (p. 265). Now what is the cause of this hiatus?

Assuming, as I have said, that the baronies of Mowbray and Segrave were duly vested in John Duke of Norfolk (d. 1485), they were obviously forfeited by the Act of Attainder in 1 Hen. VII (p. 135). Of this there can be no question. Now the act of 'restitucion' in favour of his son 'Thomas late erle of Surrey' (4 Hen. VII) expressly stipulates 'that this statute of adnullacion and restitucion *extend not to the said Thomas to eny honour estate name and dignite but onely to the honour estate name and dignite of Erle of Surrey*' (p. 140) [2]. This would obviously exclude the baronies of Mowbray and Segrave as well as that of Howard and the Dukedom of Norfolk. Accordingly when this Thomas Howard was created Earl Marshal (2 Hen. VIII) and Duke of Norfolk (5 Hen. VIII)

[1] 'The mere fact that a Duke of Norfolk put upon his Duchess' coffin-plate a statement that she was the wife of the Lord Mowbray and Segrave is no evidence at all.'

[2] Naturally enough, these words are not those italicized in the Minutes of evidence.

he was only styled Earl of Surrey and had no baronies assigned him. Now the subsequent attainders of the house and their reversals could do no more than place its heads eventually in the shoes of this Thomas. It is to me utterly inexplicable how this objection can have been overlooked, except on the hypothesis, surely inadmissible, that the fatal words in the Act restoring the Earl of Surrey escaped notice.

If, then, the abeyance was determined under Richard III, the baronies were forfeited by attainder and have remained so ever since.

The actual resolution, however, adopted by the Committee did not pledge them (in spite of their *rationes decidendi*) to a determination in or before Sept. 1484. Although it was avowedly on this that their decision was based, they illogically resolved—*ob majorem cautelam* we may presume—that the abeyance was determined 'previously to the reign of Queen Elizabeth.'

Now, either the abeyance was determined previously to Sept. 24, 1484, or it was not. If it was not, then the earliest proof of that determination accepted by the Committee is the Act of 1604, which implied, according to the construction placed upon it by the petitioner, that the baronies must have been vested in Duke Thomas at his attainder (1572); that is to say, the abeyance was determined previous to 1572. But what is the proof that it was determined 'previously to *the reign of Queen Elizabeth*' (i.e. to 1558)? Absolutely none was given[1]!

Adopting, then, this hypothesis, it is clearly far more difficult to assume the determination of an abeyance at this comparatively late epoch than it would be under Richard III, a period relatively obscure. Moreover, in this case there is no such evidence as was afforded even by the Letters-missive of 1484. We are therefore, admittedly, dependent on a retrospective induction from the Act of 1604. And to this I propose now to address myself.

The words relied on by the claimant were:—

'To the Honour, State, and Dignitie of Erle of Surrey and to *such dignitie of baronies only* which the said late Duke of Norfolk forfeited and lost by the said attainder.'

The word 'only' has been understood as excluding any claim to the Duke's *territorial* 'baronies.' But, in any case, these guarded words could not do more than restore to the Earl such baronies as he could prove to have been vested in the late Duke. They were not, and did not profess to be, a determination of abeyance, nor did

[1] This extraordinary expression may have originated in the petitioner's claim (Additional Case, p. 27) that the baronies 'were vested in the reign of Elizabeth in Thomas . . . Duke of Norfolk,' a loose expression which is by no means equivalent to 'at the accession of Elizabeth.'

they even name a single barony. It was urged by counsel that the only baronies they could refer to were those he claimed, which must, therefore, have been vested in the Duke. But I reply, firstly, that they do not name any baronies as vested in the Duke; secondly, that even if they had, the recognition of a wrongful assumption could not operate as a creation or even a determination of abeyance.

The assumption of dignities was an ancient practice. In the early days of the Tudors, Lady Hungerford, who held three baronies, took the styles of six, two of them not genuine and one in abeyance. The Earls of Northumberland assumed the baronies of FitzPayne and Bryan, to neither of which had they any right. In the 16th century the Radcliffes, Earls of Sussex, successively assumed the baronies of Egremont and Burnel, though (Multon of) Egremont was in abeyance and Burnel also. So too, though the barony of Latimer fell into abeyance in 1577, two of its four co-heirs, the Earls of Danby and Northumberland, coolly assumed it *temp.* Charles I (as was pointed out in the Fitzwalter case), and even had it assigned to them on their garter-plates at Windsor[1]. And this brings us to the very reign when the similar wrongful assumption of Mowbray was recognized (we hold) in error by the Crown.

For that the Crown did so err we now proceed to show. An armorial decision of the Court of Chivalry in 1410 induced the then Lord Grey de Ruthyn to assume the baronies of Hastings and 'Weysford' [Wexford], and both these titles were duly assigned by the Crown to his heir when he was created Earl of Kent, 1465 (and in 1484, 1486). Yet 'Weysford' was a fancy title and Hastings one to which the Longueville decision (1640) proved the family had no right. So retentive were the Greys of their 'plumes,' that, as G. E. C. reminds us, they 'clung tenaciously to the barony of Grey de Ruthyn' even after their heir-general had proved his right to it and taken his seat. More striking, however, are the assumptions of the Devereux family and their heirs. Walter Devereux, Earl of Essex (d. 1576), assumed among his styles the Earldom of 'Ewe,' the Viscountcy of Bourchier, and the Barony of Lovayne: the first was a Norman Countship extinct since 1539, the second also an extinct dignity, and the third a fancy title. Now my point is that these titles, wrongfully assumed though they were, were recognized *nominatim*, in the Devereux Act of Restoration

[1] It was aptly observed by Lord Redesdale (who seems to have known his business better than the Law Lords) :—'You show that there were co-heirs of the barony of Mowbray; you show that an individual assumed the title; . . . but there is no proof of the abeyance being determined' (Proceedings, pp. 14–15).

(1604), as having been 'lawfully and rightly' held by the Earls of Essex! This, as will be seen, is evidence far stronger than that of the Howard Restoration Act, in the very same year (1604), which vaguely speaks of 'such dignitie of Baronies' as the Howards may have lost by the attainder of 1572. And yet this latter Act was actually treated as a sheet-anchor in 1877, and accepted as conclusive proof that the baronies of Mowbray and Segrave, which were not even mentioned by name, must have been lawfully vested in the Duke who was attainted in 1572!

To any one conversant with the practice in such matters the worthlessness of such evidence needs no demonstration.

We have now seen that, if the claim based on the Letters-missive of Richard III be abandoned, the case stands thus:—The abeyance must have been determined after the restoration of 1489 and before the attainder of 1572, but nothing is known as to how, or even when, it was done, while the only ground for supposing that it was ever done at all is an Act of Parliament at a later period, which does not state that the abeyance was determined, and does not even name the baronies in question.

So little was the supposed determination suspected at the time that the Lords Berkeley styled themselves Lords Mowbray and Segrave constantly from 1488 to 1698, a fact which counsel, of course, kept carefully out of sight. For Mr. Fleming's argument was that all such assumptions were valid; and yet, if this one was so, there was at once an end of his case.

The view that I shall myself advance removes every difficulty. The Mowbray summons of 1640 is, I hold, exactly parallel with the Strange and Clifford summonses of 1628. All these were issued in error. It can be shown that great nobles were in the habit of annexing minor titles in the most casual manner; and that the Crown, in this matter, so far took them at their own valuation as to allow them, in most formal documents, these ornamental appendices. Of this there are most curious examples, although they are little known. The strange doctrine that an earldom (in tail male) 'attracts' a barony (in fee) was advanced in the cases of Roos (1666)—now De Ros—and Fitzwalter (1668), but was disposed of by the judges in the latter. One of the arguments for it was that, otherwise, ancient earldoms 'should lose the plumes of their honour.' This happily expresses the spirit of those great nobles who decked themselves with such plumes, too often 'borrowed plumes,' either by inventing baronies which had no existence, or by retaining those which should have passed to heirs-general. Sometimes they did both. Thus in the case of the Earldom of Oxford (1626) the judges held that the baronies of 'Bulbeck, Sandford, and Badlesmere'

had passed away to heirs-general a century before, but that five earls, in succession, had since 'assumed these titles nominally in all their leases and conveyances, and the eldest son [is] called still by the name of Lord Bulbeck.' But modern research has further shown that 'Bulbeck and Sandford' had never even existed as peerage baronies, while Badlesmere was in abeyance, an abeyance determined by the earls themselves in their own favour, as was that of Mowbray (I hold) by the Howards. So, too, the Howards in 1627, foisted upon the Crown 'the titles and dignities of the baronies of Fitz-alan, Clun and Oswaldestre, and Maltravers,' which they employed, though it is admitted that Maltravers alone was a genuine peerage barony. The Crown was actually induced not only to recognize them all (to the eternal confusion of peerage students), but to wrench them from their natural descent and entail them, together with the earldom and castle of Arundel, on the Howards by a special Act of Parliament. The same Act recognized by its preamble the pretension that Arundel was an earldom by tenure, though our better knowledge of history has shown the absurdity of the claim. Thus these baronies were made, by violence, to 'attend' the earldom, much as James I, in 1620, by a similar stretch of the prerogative, had annexed the barony of Offaley to the earldom of Kildare.

The best known and latest instance of erroneous recognition by the Crown is the patent of creation for the earldom of Leicester in 1784. In this instrument three baronies were recognized as vesting in the Earl, to none of which he could prove a right.

From such recognitions it was but a step to summoning the son and heir of an Earl in a barony to which his father was supposed to be entitled. This was actually done, by universal admission, in the case of the Earl of Derby's son, summoned as Lord Strange in 1628, though the Earls, since 1594, had not been entitled to that barony, as also in that of the Earl of Cumberland's son, summoned in 1628 as Lord Clifford, though that barony had passed away from the earldom in 1605. It was again done in 1722, when a summons in the barony of Percy was issued in error. In all three cases the result of this error was, admittedly, the creation of a wholly new barony. My contention is that the Mowbray summons of 1640 was an error precisely similar. And as for the admission of the original precedence, it was similarly admitted in the case of Percy.

To recapitulate, I claim to have shown:—

(1) That the words of the Resolution, 'previously to the reign of Queen Elizabeth' (i.e. to 1558), are merely a careless blunder; and that what was meant was 'previously to' the death of Thomas Duke of Norfolk (i.e. to 1572) who lived in the reign of Elizabeth.

(2) That the Letters-missive of Richard III were vouched by the petitioner as the proof of the determination of the abeyance (before their date).

(3) That if the abeyance was then determined, the baronies of Mowbray and Segrave are now under attainder.

(4) That the determination of the abeyance previous to Sept. 1484 must therefore be abandoned as a *ratio decidendi*, and the Resolution be construed as asserting a determination between 1489 and 1572.

(5) That of such determination there is no proof, petitioner having vouched the Letters-missive as the 'sole ground' for the user of the titles, and the Committee having deemed them essential to his case.

The moral, surely, is obvious enough. If peerage claims are to be thus decided on *ex parte* evidence, the most fatal flaws in the petitioner's case may, as on this occasion, pass undetected.

J. H. Round.

Note.—Since this article was written, the arguments in the Howard of Walden case (1691–2) have been made more accessible by the publication of a House of Lords MS.[1] They are important as showing that, even at this late date, it was urged on behalf of the Earl of Suffolk (heir-male) by his counsel, Mr. (afterwards Chief Baron) Ward and Mr. Wallop that the barony was vested in him, not in the heirs-general (in spite of the 1668 decision *ut supra*). For this they relied *inter alia* on the Strange and Clifford cases (1628) in which, as we now hold, the titles were recognized in error. Failing this, they urged that the Barony was wholly at the king's disposal, without preference to the heirs-general over the heirs-male. For this view their precedent was the case of the Earldom of Oxford (1626), 'in which case it was decided that the baronies were at the king's disposal[2].' The precedents put in on behalf of the Earl of Suffolk, and certified by Windsor Herald, confirm further my statements as to the assumption of dignities. Of these, the two most important for my purpose are:—

(1) Derby.—In this case, on the death of Ferdinand, Earl of Derby (1594), the baronies vested in him are held to have fallen into abeyance between his three daughters.

[1] Thirteenth Report on Historical MSS. App. V. pp. 479–489.

[2] The judges had only reported that 'they, in strictness of law reverted to, and were in the disposition of King Henry the Eighth.' But the House resolved that (according to the judges) 'the baronies of Bolbecke, Sanford, and Badlesmere are in His Majesty's disposition' (Lords' Journals, III. 537), March 22, 1625–6, and certified the king (April 5) that 'they are wholly in your Majesty's hand, to dispose at your own pleasure' (p. 552).

'The Baronies, notwithstanding, were used and enjoyed by William, Earl of Derby, brother and heir-male to the said Ferdinand, and being chosen Knight of the Garter (at his installation, according to custom), the said William's titles and stile were proclaimed in the presence of Queen Elizabeth in 1601, which were William Stanley, Earl of Derby, Lord Stanley, Strange of Knocking and of the Isle of Man, and were also engraven upon his plate under his arms at the back of his stall, and continue still [1692] to be used by the present Earl of Derby, without the least dispute, which we do esteem a good precedent.'

(2) Oxford.—In this case the judges had reported (1626) that the three baronies (*vide supra*, p. 75) 'descended to the general heirs of John, the fourth Earl of Oxford' in 1526.

'The Baronies, notwithstanding, accompanied the Earldom, and Aubrey de Vere, the present Earl of Oxford, when installed Knight of the Garter [1660], with the title of Earl of Oxford were (*sic*) also proclaimed his baronies of Bolebec, Sandford, and Badlesmere in the presence of the king, and are also engraven upon his plate at the back of his stall at Windsor, which we do esteem also a precedent.'

These cases have a grave bearing on the admissibility of garter-plates in evidence (cf. *supra*, p. 73). Considerable stress was laid on their testimony in the Mowbray case itself; but if that of the Letters-missive must now be abandoned, a garter-plate will not be found an efficient substitute.

J. H. R.

THE NEW RULES OF THE SUPREME COURT.

(Nov. 1, 1893.)

IN June 1892, the Council of Judges assembled for the purpose of examining into any defects which might exist in the system of procedure under the Rules of the Supreme Court, &c. &c., in pursuance of the 75th Section of the Judicature Act 1873.

In July of the same year they reported to the Secretary of State that it would in their judgment be expedient to make such amendments in the Judicature Act, and otherwise, as might be necessary for giving effect to the Resolutions which they enclosed in the Report.

Thereupon the Bar Committee, the Incorporated Law Society, and Mr. Justice Cave proceeded to consider and criticize the Report and Resolutions of the Council. The Lord Chancellor put forth his views upon them in the shape of a Memorandum; a 'Member of the Bench,' in a couple of articles in the Times (9th and 10th August, 1892), gave a popular sketch of the subject, and the rank and file of the profession expressed their views and their feelings in the columns of the legal and other Journals.

There were certain special points upon which controversy became acute, and around which it centred.

It is proposed in this article to consider these principal matters, and to see how far they have been dealt with by the Rule Committee in the final stage of the proceedings which has now been reached.

Circuits.—The grouping or centres of country civil causes was, in the opinion of the Council, the most valuable part of the proposed reform, without which all the other alterations suggested would have but little effect.

But this part of the scheme did not meet with the approval of the Lord Chancellor, or of Mr. Justice Cave, or of the profession, and the Resolutions of the Council (Res. 1–10) have not been acted upon either by the Rule Committee or otherwise, save so far as the subject may be affected by the Order in Council of July 28, 1893.

Summons for Directions.—A *compulsory* summons for directions was strongly favoured by the Council (see Report and Resolutions, 11–18), following the recommendation of the very strong Committee of 1881, which consisted of Coleridge C.J., James L.J., Sir J. Hannen, Bowen L.J., Lord Shand, Matthew J., Sir H. James, Sir F. Herschell, and Messrs. Reid, Hollams and Harrison. But

the Lord Chancellor felt that the objection entertained by a large section of the Bar, and by solicitors without exception, to a *compulsory* summons rendered it very doubtful whether such Resolutions should be persevered with. The Bar Committee, the Incorporated Law Society, and Mr. Justice Cave were also strongly against the proposal, and in the result the Rule Committee, whilst enlarging the Order (O. 30) in some important respects (see 'Pleadings,' *infra*), have limited the application of this summons to cases not specially assigned to the Chancery Division, and have left the issuing of such a summons *optional*, as it was before (O. 30).

Pleadings.—The Council considered that no pleading should be made without an order (Res. 14), and the Lord Chancellor was of the same opinion. On the other hand, the Incorporated Law Society and Mr. Justice Cave insisted that pleadings could not be safely abolished. The Rule Committee have taken a middle course by providing (O. 18 A) that a *plaintiff* may, without pleadings, proceed to trial, subject however to the possibility of a judge making an order, on the application of the defendant, that a statement of claim shall be delivered. This is an amplification of the existing procedure under O. 34, r. 9. But in an action, in a matter *not* assigned to the Chancery Division, it would appear that *any party* (see definition J. A. 1873, s. 100) thereto, may by applying for a summons for direction (O. 30, r. 1) throw the whole question as to whether these are to be pleadings or not, under the jurisdiction of the Court. For on the hearing of such a summons the judge *shall* make an order with respect to *pleading*, &c. (O. 30, r. 2). The net result seems to be that the plaintiff *in any action* may go to trial without pleading subject to the possibility of an order to plead being made against him, and that any 'party' (see definition J. A. 1873, s. 100) to an *action not specially assigned* to the Chancery Division, may by a summons for directions bring the question of pleading or no pleading under the jurisdiction of the judge.

Discovery.—The Council thought that discovery both by interrogatories and by affidavit of documents should be allowed only when they appeared to be necessary for the fair trial of the cause or for the saving of costs (Res. 19, 20). The Lord Chancellor agreed. The Incorporated Law Society and Mr. Justice Cave were of opinion that the right to discovery should be unrestricted, but that the abuse of it should be punished with costs, whilst the Bar Committee adhered to the views expressed in their Report of June 1891, to the effect that the power of using interrogatories should be more effectively controlled, that particulars in the pleadings (O. 19, r. 6) should be insisted upon, that the parties should be enabled to claim

by endorsement of the pleadings the usual affidavit of documents, and that the deposit required by O. 31, r. 26, should be abolished.

The Rule Committee have substantially followed the Resolution of the Council of Judges. Interrogatories can now only be delivered *by leave*, and the interrogatories proposed to be delivered are to be submitted to the Court or a Judge. Any party may apply, without any affidavit, for an order for discovery of documents, and inspection of particular documents may be ordered upon an affidavit showing of what document inspection is sought, and that they are in the power of the other party (O. 31, rr. 2, 12, 18). But r. 26 of 31, requiring a deposit to be made, is retained unaltered.

The Council also recommended that in the case of business books, inspection should be replaced by an affidavit and by extracts or copies (Res. 21). This Resolution, although not approved by the Bar Committee, is carried into effect by O. 31, r. 19 A.

Originating Summonses.—The Council thought that originating summonses should be extended to all cases of construction of written instruments (Res. 64–66). The Lord Chancellor, the Bar Committee, the I. L. Society concurred. Mr. Justice Cave, however, saw no necessity for this, but thought that the ordinary writ of summons, with provision for its proper endorsement, and an extension of O. 14 was all that was necessary. The writer ventured, in the interests of simplicity and uniformity, strongly to support this view in a paper which appeared in the REVIEW for January, 1893. However, it is now provided that '*in any division* of the High Court any person claiming to be interested under a deed, *will*, or other written instrument may apply by originating summons for the determination of *any question of construction* arising under the instrument, and for a declaration of the rights of persons interested' (O. 54 A). These summonses moreover, or notice of them, may now be served out of the jurisdiction (O. 11, 2), and the former rules relating to them when they were available, in the Chancery Division only (O. 55, rr. 20–23), are now cancelled, as also the old form of summons (App. L, No. 25), and new rules (O. 54, rr. 4 B, C, D) and new forms (App. K, No. 1 A–1 F) are substituted.

The principle of enabling persons to obtain the opinion of a competent tribunal upon questions arising on the construction of written instrument in a cheap and summary manner is excellent. But the benefit conferred by this new rule would, it is submitted, have been much greater if care had been taken to make the practice under it absolutely plain and simple, by clearing away the doubts and difficulties with which the imperfection of the Rules and the ingenuity of the legal mind have incumbered this Procedure. To members of the Chancery Bar and to Chancery officials, whose

natural acuteness of mind has been abnormally developed by a long course of Chancery practice, the 'loose conglomerate' of the R. S. C. presents but little difficulty.

But originating summonses are no longer a speciality of the Chancery Division, but may be used in *all* the divisions. And to practitioners in the Q. B. D., to country solicitors and managing clerks, every unnecessary subtlety of procedure is a grievous burden.

Let us imagine then a practitioner *not* in the Chancery Division confronted by the new forms of originating summons in Appendix K, No. 1 A, No. 1 B, and endeavouring, by the light afforded by the Rules and his own intelligence, to find out what they mean.

The first (No. 1 A) he finds is similar to the old form (App. L, No. 25) except that it partakes more of the peremptory character of a writ, and about this form he has little difficulty. Then he proceeds to consider No. 1 B which is headed 'Originating summons *not* "inter partes" (Order LIV, rule 4 B).'

This he thinks to himself must be some new kind of 'ex parte' summons. But on looking a little further into the forms he finds that a person called therein a '*respondent*' is to be '*served*' and is to *appear*, and that in default of appearance an order may be made against him. This puzzles our practitioner *not* in the C. D., for he knows his practice well enough to know that the definition of a 'party' includes every person *served with notice of a proceeding*. But here there is a person served, but who nevertheless is not a party because the form says it is a summons *not* 'inter partes,' which means so far as his scholarship goes, a summons *not* between *parties*. Then he remembers further that every originating summons as constituted by the rules of 1883, and presumably by those rules is an 'action.' So it seems to him that he has learnt that an action may now be commenced without any parties—an 'ex parte' action in fact—and that is a novelty to him. Stimulated by the acquisition of new ideas he proceeds further in his investigation. He notes the heading 'In the matter of the trustee of the will of A. B. and in the matter of the Trustee Act, 1893 (or as the case may be).' Clearly then he thinks this being the form of an Originating summons, it is intended by this heading to show that such a summons may be used in applications under the Trustee Act, 1893. He turns to his new rules under that Act, and he finds 'all applications under the Act may be made by petition except,' &c., &c., and that 'all the following applications under the Trustee Act, 1893, may be made by *summons*' (O. 55, r. 13 A). By summons! But the form he is considering is an '*originating* summons,' the creature of the rules of 1883 and 1893, and he has always understood that there is a thin but

substantial distinction between a summons under an Act of Parliament originating procedure, and an Originating summons as constituted by the rules. The latter, he remembers, constitutes an 'action,' *Re Fawsitt*, 30 C. D. 231. The former is a summons 'in a matter not being an action.' The time for appealing from an order in the one case differs from that in the other. This distinction he now infers has now disappeared, and the word 'summons' (O. 55, r. 13 A) and 'Originating summons' (R. S. C. Charitable Trusts Act, 1891) henceforth mean the same thing.

Whether our practitioner is correct in his inference is a question for the solution of which his client will probably have to pay.

Continuing his examination further he observes that both in No. 1 A and in No. 1 B the defendant in the one case and the 'respondent' in the other is told that he '*may*' appear thereto, &c. Now he knows on the authority of Cotton L.J. and his grammar, that this word is potential, and that it can never mean 'must' or 'shall.' He turns to his rules, O. 54, r. 4 C, and reads, 'The parties served, &c., "*shall*" enter an appearance.' Somewhat shaken he reads on. Appearances, say these forms, may be entered 'at the Central Office,' the situation of which is described with precision. Another glance at O. 54, r. 4 C and he sees that they must be entered at the Central Office, *or in Admiralty matters at the Admiralty Registry*, the situation of which is evidently known far better than that of the Central Office as no attempt is made to describe it.

The presumption of course is that the Rules and Forms are correctly and properly drawn, and that it is only the want of knowledge or of intelligence on the part of the practitioners that causes any difficulty. Any chief clerk would explain to our practitioner that a summons, *not* 'inter partes,' is a well-known term of art, and signifies a summons *to which there is no record, not* a summons to which *no parties* appear. It is true that to a comparatively few persons these words *not* 'inter partes' would convey this meaning. But the point is that to the great body of practitioners, to whom for the first time this procedure is extended, they will seem to mean what in fact they say, and will cause needless trouble. The distinction between *Originating Summonses*, which are the creatures of the R. S. C., and Summonses *originating procedure*, which are the creatures of various Acts of Parliament, has, in fact, become confused, although in many points it is of much practical importance (see for instance O. 58, r. 9 (n), 'Any other matter,' &c., A. P. 1894, p. 1028). But this matter cannot be dealt with in this article.

Leaving these little peculiarities, however, and looking at the new practice of originating summons broadly, it seems probable that one effect of O. 54 A will be that the equitable jurisdiction of con-

struing wills, practically reserved to the Chancery Division by O. 55, r. 3 (g), is now extended, so that all Divisions of the High Court, including the Probate Division, will now become 'Courts of Construction.'

Possibly also questions of Construction arising between Vendors and Purchasers will now be determinable by all Divisions, and not by the Chancery Division alone. See Vendors and Purchasers Act, 1874, s. 9. One other small question presents itself, does the direction given by the Judges of the Chancery Division as to lodging Certificate before sealing of an originating summons (see An. Pr. 1894, p. 978) fall to the ground with the repeal of O. 55, r. 21, or is it to be extended to all Divisions?

Pending business.—By the J. A. 1873, ss. 22 & 42, provision was made as to the application of the Rules in the Schedule to 'pending business.' In like manner the headnote to the R. S. C., 1883, provides that the Rules shall apply, unless otherwise provided to all proceedings taken on or after the day upon which the Rules came into operation. Do these Rules of 1893 apply to such business; are they to have a retrospective operation? The better opinion seems to be that they do so apply. These Rules form part of the new Code of 1883, and may be cited with reference to them (R. 32), and the general principle is that all alterations in procedure are retrospective, see Maxwell on the Interpretation of Statutes, 2nd ed. pp. 271, 273.

Arrangement.—Having regard to the statement in the memorandum issued by the Lord Chancellor, that he has directed a draft consolidation of all the Rules to be made complete as soon as these amending Rules have been settled, this is not a matter of great importance, but a few remarks upon the subject may not be out of place. As the Rules are at present drawn there are certain well-known orders which deal with such subjects as Appearance (O. 12), Default of Appearance (O. 13), Amendment (O. 28), &c. A practitioner in search of information on any of these subjects with reference to any particular process, naturally, as the matter stands at present, turns to these particular orders. If, for instance, he wishes to ascertain the procedure in default of appearance to an originating summons he would naturally turn to the Order on Default of Appearance (O. 13). And he would not be disappointed, for under O. 13, r. 15 he would find what he wanted. But if, acting on the same principle, he were to turn to O. 12 (Appearance) to find out how he should enter an appearance to such a summons, he would find nothing on the subject; that matter being dealt with under O. 54, r. 4 C. So, again, the amendment of an indorsement of a writ, special or otherwise, is dealt with under O. 28, rr. 1 and 2. But

the new rule as to amending a writ specially indorsed is dealt with under O. 14, r. 1 (b). And, it is submitted, that O. 18 A would be more appropriately placed under one of the subdivisions of O. 36.

Other matters.—Other points of practice affected by the new Rules such as the extension of O. 11 (Service out of the Jurisdiction) to other process than writs of summons or notice of writs of summons (O. 11); the shortening of the time for final appeals, O. 58, r. 15; the costs of unsuccessful claims and of inquiries as to legacies, &c. (Res. 75, 77, O. 65, rr. 14 A–14 C), do not call for special notice as they are matters upon which everyone was agreed and are likely to be absolutely beneficial.

The Authorities and Books of Practice.—Books of Practice are the principal channels by which information as to the practice and procedure of the Supreme Court reaches the great body of practitioners. It is very essential for their use and convenience that such books should contain the latest information in the most convenient form.

The authorities, it may be taken for granted, would, in the interests of the profession and of the public, desire that all changes in procedure should be brought to the knowledge of practitioners as quickly and as conveniently as possible. It is therefore respectfully submitted to them, that it would be very beneficial to all concerned if they would cause a notice of their intention to issue new Rules to be sent to the legal journals some two months or so before such intention is to be carried into effect, so that the publication of such books might, in the interests of perfection, be temporarily postponed.

THOMAS SNOW.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Treatise on the Law of Quasi-Contracts. By WILLIAM A. KEENER. New York: Baker, Voorhis & Co. 1893. 8vo. xxxii and 470 pp.

MR. KEENER has done a useful work in putting together the rules which govern the sort of obligation called Quasi-Contract. The name itself has a makeshift air, and is on the face of it a confession of juristic failure. It is hard to find any common ground or character for obligations so miscellaneous as those which are included under this one name. They were strung together by the pleader's art, and by a general application to them of the common counts, which conferred on them an outward and artificial semblance of contract. Thus they escaped a separate analysis and classification; and thus they figured for a while in books on contract as the 'contract implied in law,' and more recently have been ejected from the region of contract into a sort of limbo of obligations which spring neither from agreement nor from wrong.

If Mr. Keener had done no more than set out the incongruous group of liabilities which are held together by a common name he would have done good service to the student. But he has done a good deal more than this. He has established very clearly the distinction between the contract inferred from words or conduct, and the so-called contract implied in law, and he has given us a full and interesting account of the various obligations with which he has to deal. Starting with the principle that, apart from obligations arising by way of record or from the imposition of a statutory duty, quasi-contract rests on the doctrine 'that no man shall be allowed to enrich himself unjustly at the expense of another,' he works out the liabilities which the Courts have created in trying to give effect to this doctrine.

It may be owing to the very elastic nature of the doctrine which Mr. Keener takes as his starting-point that he is led to extend his topic so as in places to encroach on the domain of contract. Thus he places under the head of quasi-contract the liability of an infant for necessaries (p. 21); the liability to pay a *quantum meruit* where something has been done under a contract which is afterwards broken and discharged by the fault of the defendant (p. 309); the liability to indemnify an agent against charges not specified but contemplated in the contract of employment (p. 398). All these spring from agreement, and their introduction into the law of quasi-contract revives to some extent the confusion from which we are only just emerging.

Nor is the terminology always unexceptionable. The words 'Waiver of Tort' are not a satisfactory description of the subject which the chapter

thus headed contains. The remedy in assumpsit, as an alternative to the remedy in tort, which was open to the plaintiff whose property had been wrongfully used or taken, did no doubt create a quasi-contractual liability: and if the plaintiff chose to sue on a fictitious undertaking to give back the value of the property so dealt with, he could not also sue the wrongdoer in tort. But the waiver of the tort did not create the liability in assumpsit, and it is not a good way of describing a right to call attention to the remedy which you do *not* adopt.

The difficulty of accepting so dangerously vague a principle as that on which our author would base the liability in quasi-contract is well shown by some remarkable decisions of American Courts, which he condemns with no more severity than they deserve. Thus in *King* v. *Welcome*, 5 Gray 41 (p. 234), a contract to serve for a year from a future date was made orally. The plaintiff broke his contract within the year, and sued upon a *quantum meruit* for such services as he had rendered. He was allowed to recover, and the defendant was not allowed to prove that the contract was for a year's service lest he should thereby 'charge the plaintiff' with a contract which did not comply with the Statute of Frauds. It would seem that the Court overrode the expressed intentions of the parties and misinterpreted the Statute of Frauds in order to carry into effect some equitable notions of its own. Again, in *The Manhattan Life Ins. Co.* v. *Buck*, 93 U. S. 24 (p. 346), the parties agreed that on non-payment of a premium a policy of life insurance should be void, and that all previous payments should be forfeited. Yet upon default in payment of a premium it was held 'unjust and inequitable' that payments already made should be forfeited, and they were recovered. After this one cannot be surprised to find (pp. 254–257) that where work is agreed to be done upon a building which is destroyed by fire when the work is only commenced, the contractor is allowed to recover damages from his employer on the ground that the latter was bound 'to keep on hand and in readiness the building in which the work was to be done.'

If Courts of law are thus apt to disregard the plain meaning of parties to contracts, and to award sums of money in accordance with their own crude or fantastic notions of what is equitable, Mr. Keener will have done practical service to the litigant in his endeavour to define an obligation so liable to indefinite extension. In any case he has earned the thanks of the student for his effort to collect and arrange the rules which govern a difficult and somewhat neglected branch of our law. W. R. A.

Tagore Law Lectures, 1893. *The Law of Estoppel in British India.* In Two Parts. I. *Modern or Equitable Estoppel.* II. *Estoppel by Judgment.* By Arthur Caspersz. Calcutta: Thacker, Spink & Co. London: W. Thacker & Co. 1893. La. 8vo. xxxix and 511 pp.

The learned author mentions in his preface that his work contains the substance of sixteen Tagore lectures. He has devoted the first part of his work to modern or equitable Estoppel, that branch of the subject which at the present day is of the greater practical importance, and relegated the subject of *res judicata* to the second part. The law of Estoppel in India, as he points out, has in several particulars been laid down in general terms in chapters of the Indian Codified Law; *Res judicata* in the Civil Procedure Code, and Estoppel arising from representation, from tenancy, from acceptance of a bill of exchange, and from the position of a bailee or licensee, in

the chapter on Evidence. But the treatise of Mr. Caspersz ranges over the entire subject, including those portions of the law of Estoppel not yet dealt with in the codified chapters of the Indian law. A great body of decisions had grown up in India prior to the so-called Codes, and the stream of cases still flows on. The groundwork of the law of Estoppel in both of the branches into which Mr. Caspersz has divided it, is in the main the same in India as in England, but there are peculiar features in many of the Indian cases, especially in Estoppel arising out of representation, as, for instance, Benami transactions, which would be perplexing to one who had given his mind solely to those of the English type. It must therefore be an advantage to the Indian law student and practitioner to meet with a treatise presenting the most important English and Indian cases, set out with great fulness and accuracy, and discussed with care. We have looked carefully through the whole work, but from want of space are precluded from observing upon particular parts. It may be well however to refer to two points, and first to the subject of Estoppel by previous judgment. On this question very conflicting views have been entertained by the Courts in India as to the meaning of the term 'on the same cause of action' in section 2, Act VIII of 1859 (the first enactment of the Civil Procedure Code), and of the language employed in section 13 of the latest enactment of the Code, Act XIV of 1882. Explanation II of this section embodies the rule enunciated in *Henderson* v. *Henderson*, 3 Hare 115, that the plea of *res judicata* applies not only to what was actually brought before the Court and decided, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. The gradual working out of these views and the endeavours made to reconcile them are well presented in Chapter V, Part II. Secondly, we may notice the part of Mr. Caspersz' work in which the construction of section 115 of the codified law of evidence, as embodying the law of Estoppel by representation, is dealt with. On this matter, all the important decisions are carefully marshalled and discussed, including the recent Privy Council judgment in *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R. 19 I. A. 203, which finally decides that the law of India, as far as it is embodied in this section, is identical with that of England.

The arrangement of the subjects of the chapters in the two parts appears natural and convenient. Mr. Caspersz has followed the plan now largely adopted of attaching to each case the year of its decision, which enables the student to trace the gradual development of the law. The work appears to have been executed with great care and ability, and it is, we think, likely to commend itself to students and to the profession generally, both in England and in India.

Estoppel by matter of record in Civil Suits in India. By L. Broughton. London: Henry Frowde, and Stevens & Sons, Lim. 1893. 8vo. xi and 168 pp.

Mr. Broughton's little work bears marks of undue haste in preparation, which will probably detract from its usefulness as a repertory of the law in a small compass. Part III, Chapter viii, beginning at page 114, is intended to show principally how the Evidence Act regards the judgments of Courts of exclusive jurisdiction, but it is headed 'Estoppel by Judgment,' a subject which has already occupied the preceding 113 pages, and is indeed, properly considered, the subject of the entire work. The regular mode of citing the

Indian Reports is not always observed, so that it is sometimes difficult to distinguish between the earlier Reports of the several High Courts and the later Indian Law Reports. In so complicated a subject an index to the text is almost indispensable.

As a whole, we think the work is susceptible of much improvement.

The Elements of Jurisprudence. By T. E. Holland. Sixth Edition. Oxford: at the Clarendon Press, and London: Stevens & Sons, Lim. 1893. 8vo. xx and 395 pp.

The mere fact that this work has reached a sixth edition in a little more than thirteen years is sufficient to prove its established reputation, and there is no need for us to recommend it to our readers. We learn from the preface that it has undergone careful revision since the last edition was published in 1890, and that the author has now translated the German and Greek definitions which occur in the earlier chapters. In other respects there seems to be no substantial difference between this edition and its immediate predecessor. There are, however, two matters upon which we should like to offer a little criticism, particularly as they are of fundamental importance, and because the author's views upon them appear never to have been challenged, or at any rate never to have hitherto been shaken.

The first is the capacity of the State to have legal rights against its own subjects under laws of its own enactment (p. 116). 'The State is surely as capable of possessing rights as the Corporation of London' is an argument which apparently forgets the crucial difference between the two cases—that the Corporation is a subject, while the State is the State—and which we could hardly believe could be used by any one who had ever read the convincing reasoning of Austin. Surely one might as well speak of God having 'rights' against his own creatures, correlative to the duties imposed on them by the Divine Law! The second matter is the classification of Rights on pp. 110 sqq. Of the four ways in which Professor Holland has always said they may be classified, only the third and fourth are known to Austin. The other two—the division into Rights Public and Private, and that into Normal and Abnormal—appear to be untenable. Law, no doubt, may be divided into Public and Private, or into Normal and Abnormal; but it does not follow that Rights admit of being divided in the same ways; and even assuming that there can be such a thing as a 'Public Right,' it seems impossible to distinguish it, *as a right*, from an identical 'Private' right. Is not the State's so-called right to its cavalry horses precisely the same kind of right as my right to my horse? or if I have two exactly similar horses, and present one to the State, and the other to a friend, do they thereby become different kinds of horses? So too with the 'Abnormal' Rights. It would seem, on reflection, that there is nothing 'abnormal' about the Right, for we believe that under given circumstances every so-called abnormal right may belong to the normal man. Is the infant's right to avoid his contracts at his option a different kind of right from that of a normal man to rescind a contract into which he has been induced to enter by fraud or undue influence? What is abnormal is in truth the way in which the law treats certain classes of persons, as compared with the great majority.

J. B. M.

The first principles of Jurisprudence. By JOHN W. SALMOND. London: Stevens & Haynes. 1893. Cr. 8vo. xii and 264 pp.

THIS is a short introduction to Jurisprudence confined to the complex idea of Law. It is chiefly characterised by its apparent desire to reform or subvert the generally accepted theories, definitions, and classifications of modern jurisprudence. Its first chapter may be described as an attempt to reproduce the confusion of ideas as to law, sanction, rights and such notions, which Austin spent many years of his life to dissipate; to re-introduce theories of natural and positive rights; to justify by usage and reason speaking of rights, wrongs, and duties apart from any regulative system; to be conscious of no absurdity in saying that a man wrongs himself, and no man is wronged who has no rights—'why then has he no rights against himself?'—and much else which Austin would have relegated to the sphere of ethics.

The chapter on administration of Justice, and the distinction between Punishment and Redress, Criminal and Civil law is well and clearly reasoned out. Modern definitions of law are subjected to considerable criticism, as omitting, in three respects, essential parts of modern legal systems.

In the chapter on the state, the definitions of political society of Bentham and Austin are considered, and a new definition proposed and justified. The doctrine of the illimitable power of the sovereign in legislation is called in question under the new definition of law 'which embraces all the principles applied by the state in administering justice, and not merely those which create and define duties'; the author's conclusion being based more on hypotheses than on facts. The question of the state's having legal rights against subjects is decided in the affirmative by application of new definitions of right and wrong.

There is a very ingenious discussion on Property and Obligation, based however on a new definition of rights *in personam*, confining their scope to a right to a duty to act, and to a negative wrong. 'Thus a personal right is a right to receive, while a real right is a right to retain.' The idea that a right *in personam* may be to a forbearance, e. g. arising from a contract in restraint of trade, the author rejects, or omits.

There is also a new theory of the true distinction between substantive law and procedure, and an interesting and novel discussion on the origin of law. The book is an exceedingly suggestive one, though decidedly heterodox in its opinions.

A Treatise on the Law of Bills of Lading. By EUGENE LEGGETT. Second Edition. London: Stevens & Sons, Lim. Calcutta: Thacker, Spink & Co. 1893. 8vo. lxiv, cxiv and 671 pp.

THIS work, the special characteristic of which has been the considerable number of forms of bills of lading collected in its appendix, has now reached, after some delay, a second edition, and in doing so has assumed almost an excessive bulk. It surely ought to be possible to deal with the law of bills of lading, which after all is not a subject of great magnitude, in less than nearly 850 pages. It certainly at first sight is refreshing to find nearly fifty pages devoted to the Through Bill of Lading, for that curious and complicated product of commercial development bristles with difficulties, if it is sought to force it within the strict limits of legal propositions, and the temptation to the cautious writer of text-books to dismiss such a Frankenstein's monster rather summarily is great. But the appearance of

discussion in Mr. Leggett's book is delusive. One-third of the fifty pages are devoted to what is practically a verbatim reprint of Greeves' case, and the judgment of Kelly C.B. therein, while another eight pages cover an abstract of *Moore* v. *Harris*; when the statutes and cases cited at some length have been eliminated, the amount of discussion of principle left is remarkably small.

Indeed while Mr. Leggett's book is useful as a collection of cases, for students to whom reports are not accessible, the grasp of principle displayed in it is very slight. A work whose main divisions are:—'Part I. the Nature of a Bill of Lading, and its Legal Incidents. Part III. The legal effect of the several clauses and stipulations in the Bill of Lading. Part IV. The rights and liabilities of the several parties under the bill of lading,' obviously betrays a lack of the system and power of generalization necessary to the writer of a good law-book. A work which begins with a so-called definition of a bill of lading like the following:—'A bill of lading is a negotiable document transferable by endorsement, and is made singly or in sets .... and is signed by the master or the purser of the vessel, or by an agent or clerk of the owner or charterers, or by a broker per procuration,' still more clearly shows the same failing. The definition quoted would tell a student approaching the subject for the first time nothing that would distinguish a bill of lading from a bill of exchange, except that it had some undefined connexion with a ship, and the student would read through six pages of details before reaching the clear and comprehensive definition of the Indian Stamp Act. The book, in short, is a good example of the old system of making books by stringing cases and headnotes together by general remarks.

Mr. Leggett has done service in calling attention to the recent United States Act, which has declared the bills of lading in common use in England on ships trading with ports of the United States, null and void, and instead has endeavoured to make a contract for the parties. The key to the interpretation of this statute by the English Courts will be found in the Missouri case (1889) (42 Ch. D. 321), strengthened by a declaration inserted in the bill of lading of the intention of the parties that their contracts shall be governed by English law. The recent rules formulated by a London conference, too late for notice by Mr. Leggett, will call for practical attention when, if ever, it shall appear that any large shipowners intend to act on them.

Darby and Bosanquet's Practical Treatise on the Statutes of Limitations of England and Ireland. Second Edition. By F. A. Bosanquet, Q.C., and J. R. V. Marchant. London: W. Clowes & Sons, Lim. 1893. xcii and 796 pp.

A Treatise on the Statutes of Limitations. By Edgar Percy Hewitt. London: Sweet & Maxwell, Lim. 1893. xxvi and 335 pp.

Twenty-six years have elapsed since the appearance of Darby and Bosanquet's Treatise on the Statutes of Limitations. During this period that work has held the field, no other very satisfactory dissertation on the subject of it having been produced. The result of this delay in the preparation of a second edition has been to compel the practitioner to consult special handbooks in all cases in which the law since 1867 has been altered by statute or by decision. And in the interval since that date at least two important Acts of Parliament—the Real Property Limitation Act of 1874, and the Trustee Act, 1888—and a mass of judicial opinion, have combined to alter,

modify or settle many points relating to the limitation of actions. In the meantime, Mr. Darby has died, and Mr. Marchant has become the colleague of Mr. Bosanquet. The legal profession is to be congratulated upon the possession of a work, which, after a careful examination of its statements and comments upon difficult questions, appears to us to supply a long-felt want —the want of a reliable guide to a very intricate and far-reaching branch of English jurisprudence. The plan of the new edition follows substantially that of its predecessor, but we are not surprised that, having regard to the causes already mentioned, it has become necessary, as the authors state, to rewrite the entire book. Dr. Hewitt's work is altogether upon a smaller scale than Messrs. Bosanquet and Marchant's. It does not pretend to collate, compare, or distinguish decided cases to anything like the same extent as is done in the larger treatise, nor does it apparently aim at more than a clear exposition of the true meaning and application of the several statutes themselves as shown by the authorities bearing upon them. This is useful work, and as it has been done in a conscientious manner, Dr. Hewitt's labours will enable the student as well as the practical lawyer to find in a concise form the solution of most of the problems presented by the statutes in question. Probably few other subjects require so much consideration of legal principle as those arising in connexion with the statutory time-bar. The true nature of the right, contract or debt sued upon, the moment when the claim begins to be barred by time, the sufficiency of an acknowledgment relied on to stop the statutory time from running, the interpretation of the somewhat crabbed language in which some of the enactments themselves are couched, have in their turn, and amongst many other abstruse points of law, given rise to much, and, in several cases, conflicting, decision. It is now, perhaps, time that an effort should be made, if not to codify, at least to digest, in a single statute the crowd of enactments having a limitation of suits as their object. It is certainly time that the inconsistency of the 40th section of 3 & 4 W. IV. c. 27 with the 3rd section of 3 & 4 W. IV. c. 42 should be got rid of. And it is disappointing to find that the Legislature should not in the Trustee Act, 1893, which, while pretending to be a mere consolidation Act, contains at least some amendments of statutes incorporated in it, have given some assistance in the interpretation of the 8th section of the Trustee Act, 1888, with reference to the limitation of actions against trustees.

Manual of Practice in the Court of Session. By Æ. J. G. Mackay. Edinburgh: William Green & Sons. 1893. 8vo. xv and 801 pp.

Mr. Mackay's Practice of the Court of Session is a standard work. It is well known even to English readers. It has the rare distinction of being one of the few books about practice which a lawyer at any rate can read with pleasure. The extensive view however which Mr. Mackay took of his subject, though it made his book a mine of curious information, may possibly have increased its bulk beyond the size which suits the convenience of practitioners. The aim of the new Manuel of Practice is to provide a guide to the procedure of the Court of Session for the use of lawyers engaged in actual business. We cannot doubt it will answer its purpose. Mr. Mackay's reputation is an absolute guarantee for the accuracy of everything he writes. He is a master of his particular subject, and even an English lawyer, who cannot write as an expert about Scotch law, may admire the skill with which our author has compressed the results of his large and

valued treatise into the Manual. It is scarcely necessary to add that the statements in the book are brought well up to date. An English critic naturally turns to some of those points as to the jurisdiction of Scotch Courts which interest Englishmen. At pp. 58–61 he finds a succinct but perfectly intelligible account of jurisdiction founded on arrestment, whilst at p. 479 he finds a singularly terse and accurate statement of the Court of Session's jurisdiction in matters of divorce. It is satisfactory here to observe that the law of England and the law of Scotland have on this topic at last been brought into reasonable agreement. In both countries it is now settled that domicil is the basis or condition of jurisdiction. The Court of Session, on the one hand, if we understand Mr. Mackay rightly, no longer asserts the right to divorce persons who are not in fact domiciled in Scotland; the claim to base jurisdiction on a constructive domicil of forty days' residence has been given up. The English Courts, on the other hand, have, it may be confidently assumed, though *Harvey* v. *Farnie*, 8 App. Cas. 43, is not absolutely decisive, abandoned the logically unfounded notion that an English marriage could not be dissolved by any foreign Court. This is a subject on which it would be easy to write pages. The point however to which we wish at this moment to call the reader's attention is that all the information which can be needed by any one as to the connexion under Scotch law between divorce jurisdiction and domicil is compressed into little more than one page of Mr. Mackay's admirable Manual.

Commentaries on the Law of Public Corporations. By Charles Fisk Beach, Jr. Two Vols. Indianapolis: Bowen-Merrill Company. 1893. La. 8vo. cclxiii, xxiv and 1692 pp.

The law of corporations, public and private, has a peculiar importance in the United States, more especially through its intimate connexion with many great constitutional questions. Few branches of the law have had a fuller development there, or undergone a more thorough discussion. The American text-books on private corporations are many, and unusually satisfactory; and public or municipal corporations have been the subject of a careful and able treatise by Judge John F. Dillon. Mr. Beach has thus entered a field already well occupied. It is to be regretted that he has not done more to justify the step. These two large volumes, which, by the way, give ample evidence of the author's debt to his predecessors, contain a copious citation of authorities that may well make them a convenient hand-book for the use of the practising lawyer. But of the careful thought and close reasoning which the difficulties of the subject particularly demand, there is hardly a trace. Doubtful and intricate matters in the law of municipal corporations, many of them deeply complicated by conflicting decisions and perplexed discussion, are passed over with an ease which, so far from removing the difficulties, scarcely suggests them. Of many conspicuous instances it will be enough to mention the power of municipalities to issue negotiable obligations; their liability upon such obligations by estoppel based on recitals therein; important constitutional questions as to the so-called 'police power' of the legislature, and the right of eminent domain; and the thrice confused topic of a town's liability for the torts of its officers and agents. He who seeks for light on any of these vexed questions will obtain little from Mr. Beach beyond a reference to the principal cases which discuss them. As a whole the book differs little from the great mob of law-books which, with many sins of omission, find such justification as they have in furnishing the profession with a kind of specialized digest of the authorities.

Company Law: an abridgment of the law contained in the Statutes and Decisions. By MONTAGUE MUIR MACKENZIE, EDWARD ARUNDEL GEARE, and GAWAYNE BALDWIN HAMILTON. London: Stevens & Sons, Lim. 1893. La. 8vo. lxiv and 443 pp.

IT is not very long since we reviewed in these pages Mr. Manson's Dictionary of Company Law. Now we have a new index of Company Law, which has itself an exhaustive index. The book in our hands is an alphabetical index, with a second alphabetical index superadded. It is divided, neatly and logically enough, into three heads, first, 'the Formation of Companies,' secondly, 'the Company as a Going Concern,' and thirdly, 'Winding-up and Reconstruction.' For the first of these heads Mr. Geare is responsible, for the second and third, with the index and table of cases, Mr. Hamilton. What then is left for Mr. Muir Mackenzie? Surely the supervision and editorship of the book as a whole. No, for the preface says that 'the labour which has been bestowed upon the work is entirely that of Mr. Geare and Mr. Hamilton,' and that any 'credit is due to them alone.' Upon this Mr. Muir Mackenzie would seem to be no more than an 'ornamental leader.' However this may be, the book which bears his name is likely to be useful in Company practice. It succeeds in its aim of bringing together the statutory enactments and the decisions of the Courts in a form easy of reference. We are a little surprised to find that there is only a single finger-post directing the wayfarer to the Directors' Liability Act of 1890. But as a collection of the case law and statute law as focussed upon each of the myriad points within the ambit of Company law, this book bids fair to be useful to the officials of companies and a serviceable weapon in the hands of practitioners. It deserves a fair measure of success.

A Guide to the Income-Tax Acts for the use of the English Income-Tax Payer. By ARTHUR M. ELLIS. Third Edition. London: Stevens & Sons, Lim. 1893. xix and 359 pp.

MR. ELLIS'S useful Guide to the Income-Tax Acts has, we observe, reached a third edition. We do not wonder at this. The book constitutes a convenient manual for the guidance of persons unfortunate enough to be involved in the meshes of our income-tax legislation. The work is a good one of its kind. We may nevertheless doubt whether the kind of book, of which Mr. Ellis's work is a good specimen, can without the aid of a lawyer be of much practical advantage to laymen. What ordinary man or woman, for example, without legal training can really understand the effect of *Colquhoun* v. *Brooks*, 14 App. Cas. 493, the account of which fills eight of Mr. Ellis's pages? The manual is probably meant for and used by solicitors and their clerks. To them it is, we doubt not, of real use; and, after all, if manuals giving an account of the Income-Tax Acts are of not much use to the mass of laymen, it is not the writers thereof who are to blame. They deal with an intractable material. Nothing but re-drafting and re-enactment can make the law as to income-tax, and the same thing holds good of all our financial enactments, really intelligible. There is in the nature of things nothing, but there is in the nature of modern parliamentary government a great deal, to make the production of a clear financial code, which should tell every intelligent man what are his obligations as a taxpayer, an impossibility. The nation and individuals would gain much by a codification of the Income-Tax Acts. But it is highly improbable that as things now stand the Income-Tax Acts will ever be codified. Meanwhile bewildered taxpayers must help

themselves out of their difficulties by the aid either of legal advisers or of manuals, and among legal manuals Mr. Ellis's Income-Tax Acts will be found to occupy a high place.

The Law relating to Covenants in Restraint of Trade. By Joseph Bridges Matthews. London: Sweet & Maxwell, Lim. 1893. 8vo. 246 pp.

It reflects no small credit on a busy solicitor to have found time for the careful and exhaustive study of the law of covenants in restraint of trade. It is significant by the way of the tropical growth of our case and statute law that a single topic like this of covenants in restraint of trade or 'Service out of the Jurisdiction,' or 'Conditions of Sale,' is enough to furnish forth a volume. In treating his subject, Mr. Matthews has rightly recognized that to make it intelligible he must trace the history of these covenants. They illustrate in a remarkable way the self-adjusting power of the common law to meet new conditions. Necessarily they have changed much, but the principle which has moulded them from the reign of Henry V, and before it, until to-day has been the same, an industrial public policy, judicially expounded, setting strongly against monopolies and checking the illegitimate impulses of private self-interest; and this industrial policy is still the test of the reasonableness of the restraint, not merely the protection of the covenantee. It is the flaw in Fry L.J.'s judgment in *Rousillon* v. *Rousillon* (14 Ch. D. 351) that it rests the modern doctrine too much on this protection of the covenantee. The only fault we can find with Mr. Matthews is that he has perhaps been over-scrupulous in setting out side by side what he calls the 'jarring opinions' of individual judges, as 'Lord Justice Bowen's Theory,' 'Lord Justice Cotton's Theory,' and so on. This method is apt to confuse, to blur the broad outlines of the subject.

One excellent feature of the book is the digest of cases at the end, arranged in chronological order.

Technology of Law. By Wm. T. Hughes, of the Colorado Bar. London: Stevens & Sons, Lim. 1893. lxxi and 364 pp.

Mr. Hughes is quite right in speaking of his book 'as a great innovation on the established forms of book-making.' Indeed what with the novelty and a certain nebulousness in the author's style, we had a difficulty at first in understanding at what, in homely phrase, the author was driving. In due time, however, patience was rewarded, and we discovered that 'Technology of Law' meant nothing more formidable than a key—a skeleton key—to cases and text-books. The author's 'technological table,' 'tips or technics' is in fact a list of the names of leading cases and legal maxims ('beacon lights,' Mr. Hughes magniloquently terms them 'shining on from age to age'), with the principal sub-headings of the subject to which they relate, and the names of relevant cases grouped under them. For the weak brother, who cannot turn at once to his appropriate maxim or leading case (and we fear the weak brethren are many), there is a subject-index referring to the technological table. The idea of the book has certainly merit—the merit of enabling a lawyer to get quickly on to the scent of the authorities he wants, and a generation groaning under the *immensus aliarum super alias acervatarum legum cumulus* may be grateful for such assistance. But we think Mr. Hughes would better his method if he made the subject-index the main one, made it in fact a skeleton digest.

The Judicial Practice of the Colony of the Cape of Good Hope and of South Africa generally, with practical forms. By C. H. Van Zyl. Capetown: J. C. Juta & Co. 1893. 8vo. xvi and 674 pp.

This is an admirable book, and supplies a want long felt by lawyers and students in South Africa. Owing mainly to a long series of well-considered decisions in the Cape Supreme Court, which have been adopted and followed by other South African Courts, a well-defined system of practice and procedure has been established. Yet no serious attempt has hitherto been made to provide a text-book on this important subject, and, as Mr. Van Zyl shows, many useful decisions have never to this day been reported. It would be of great advantage if he would publish the notes which he possesses of these unreported practice cases.

The title of Mr. Van Zyl's book is cumbrous and might well be abbreviated, while the general index might be improved and an index of cases added. As to the main contents less space should have been given to some of the minor subjects; we refer, for instance, to the chapter on 'espousals.' On the other hand, such important features of the Roman Dutch system as the tenure and transfer of immovable property with its incidents, and the law of wills and *fidei commissa*, might have been dealt with at some length. And, though it would widen the scope of Mr. Van Zyl's book, it would be well worth while in a new edition to add a chapter on the special legislation on gold and diamond mining in South Africa. But these friendly suggestions are not meant at all to detract from the hearty praise which we have already gladly accorded to the book in its present form, and which is well worthy of the high reputation borne by its author among lawyers at the Cape.

Forms of Judgments and Orders in the High Court of Justice and Court of Appeal. By the late Hon. Sir H. W. Seton. Fifth Edition by Cecil C. M. Dale and W. Clowes. Vol. III. London: Stevens & Sons, Lim. 1893. La. 8vo. ccxii and 1773–2607 pp.

We welcome the prompt appearance of the third and final volume of 'Seton.' It contains the 'apparatus,' the table of cases and the index for the whole work, and is therefore invaluable to the practitioner in Lincoln's Inn. It is true that each of the two previous volumes had its own index. But what the Equity draftsman wants to aid him in his difficult task of settling minutes is the index to the whole work. For want of this we have ourselves known a Chancery counsel foiled in Court. This last instalment of a familiar helpmate is compiled with all the laborious care and patient industry which its predecessors have taught us to claim at the hands of Mr. Cecil Dale and Mr. Registrar Clowes. Our only quarrel is with the magnitude of the 'Addenda,' which is preternaturally great.

We have also received:—

A Manual of the Law specially affecting Catholics. By William Samuel Lilly and John E. E. Wallis. London: William Clowes & Sons, Lim. 1893. 8vo. xvi and 266 pp.—The object of this book is to provide for the use of Catholics a manual of the law specially affecting their religion and their religious interests. The authors appear to have accomplished their task in a satisfactory manner. The chapter in the book most interesting to the general reader is that which discusses existing disabilities, which the authors hope will 'throw some light on the alleged disqualification of Catholics to fill the offices of Lord Chancellor of England and Lord Lieu-

tenant of Ireland.' It appears that in 1872 the late Sir Colman O'Loghlen put a question on the subject in the House of Commons to the then Attorney-General, now Lord Coleridge C.J. The answer given by the Attorney-General, which bears marks of careful consideration, is given at length in Appendix C: it shows that in his opinion, given perhaps with some hesitation, that Catholics can fill both these offices. The reader will find the question discussed at p. 36 et seq. He will perhaps be surprised to learn how many and what serious disabilities were imposed on 'Jesuits and members of other religious orders or societies of the Church of Rome resident within the United Kingdom' by the Emancipation Act of 1829. No steps to give effect to these provisions of the Act have ever been taken, and as the penalties imposed by the Act can only be enforced at the instance of the Attorney-General in England or Ireland and of the Advocate-General in Scotland, it is highly improbable that any attempt will ever be made to enforce them.

Supplement to the Fourth Edition by Leopold George Robbins of Bythewood and Jarman's Conveyancing. By the Editor and ARTHUR TURNOUR MURRAY. London: Sweet & Maxwell, Lim. 1893. La. 8vo. xxxvi and 454 pp.—'The main object of this Supplement is to bring the Fourth Edition of Bythewood and Jarman's Conveyancing up to date.' Thus say the editors in the preface. We consider that they have most carefully performed the task that they set before themselves. The changes in Statute Law made since the publication of the Fourth Edition in 1884 are considerable. The reader will find full discussions of the Land Charges Registration and Searching Act 1888 (at p. 10), of the Arbitration Act 1889 (at p. 57), of the Deeds of Arrangement Act 1887 (at p. 79), of the Mortmain Act 1892 (at p. 216), of the Partnership Act 1890 (at p. 232), of the Lands Registry (Middlesex) Deeds Act 1891 (at p. 300), and of the 'Estate Duty' clauses of the Customs and Inland Revenue Act 1889 (at p. 383). On looking at these discussions the Conveyancer will find exactly what he wants. The editors have very carefully referred all the material decisions reported up to July 1893. On the whole we may say of this book that it is quite up to the standard to which Mr. Robbins always attains: what higher praise can we give?

Parliamentary, County Council and Municipal Elections. By PATRICK JAMES BLAIR. Edinburgh: William Green & Sons. 1893. 8vo. xv and 495 pp.—This is a useful practical treatise, and cannot fail to be of service both to aspirants for office and to the officials responsible for the due conduct of elections. Although primarily intended for Scotch readers, there is much in it which is of more general interest. Not the least valuable part is the appendix, which contains a complete summary of the duties of the officials, upon and in anticipation of the various elections, together with the forms proper to be employed at each step. The author gives some facsimile illustrations of the way in which electors should *not* vote, together with information as to what amount of eccentricity in the marking of a ballot paper is allowable. Truly the capacity for error is infinite, and looking at these facsimiles one might think that the intelligent elector had been trying to play at the child's game, and had endeavoured to place the mark at the right spot with his eyes closed. There are useful tables for the enumeration of votes. It may surprise some readers to learn that where there are two vacancies and five candidates—a by no means unusual case—in municipal contests, each voter may vote in any one of thirteen different ways.

The Law of Insurance; including Fire, Life, Accident, Guarantee, and other Non-Marine Risks. By ARTHUR BIDDLE. Two vols. Philadelphia: Kay & Brother. 1893. La. 8vo. civ, 649 and 764 pp.—This is a valuable treatise on a subject of almost universal interest. There are few indeed who do not, in some form or other, avail themselves of the modern facilities of insurance. Quite a new kind of insurance has recently developed itself in England in connexion with the guaranteeing of mortgages, and of deposits at banks and the like; and owing to the depression in real estate, and to failures in Colonial banks, many cases on such policies are likely to come before the Courts.

In an English case not yet fully reported (*Dane* v. *Mortgage Insurance Company*, W. N. 1893, p. 177) the decision seems to have turned on the difference in law between the contract of suretyship and that of insurance. On referring to the work before us we cannot find that this question is fully dealt with. But to the thorny paths of insurance—other than Marine—this work appears on the whole to be a reliable guide. It contains several thousand references to English and to American reports, and the work will no doubt be found useful to practitioners on both sides of the Atlantic.

Students' Precedents in Conveyancing. By JAMES W. CLARK. London: Sweet & Maxwell, Lim. 1893. vi and 144 pp.—This collection of elementary forms has been made with the view of being useful to teachers of law and their pupils, as an aid to study, not for use in practice. Under these circumstances can it be right in such a book to make the transferor of a mortgage debt convey the debt 'as mortgagee' (pp. 59, 61 and 69), or to state as if there was no doubt on the point (p. 81) that in a settlement on marriage full covenants for title may be implied by conveying 'as beneficial owner,' or to make the advancement clause in a settlement apply to shares taken by appointment (p. 95); or in a conveyance on sale by mortgagee and mortgagor to omit the words by which the mortgagor directs as beneficial owner, besides conveying as beneficial owner (p. 9)?

The Student's Guide to Real and Personal Property. By JOHN INDERMAUR and C. THWAITES. Third Edition. London: G. Barber. 1893. 8vo. 192 pp. —This is the third edition of a book which is well known and needs no introduction to students who are preparing for the final examination for the Bar. The system is well constructed for acquiring quickly an elementary knowledge of many of the principles of real and personal property law, and the questions and answers appear to be well chosen and arranged. It is hardly necessary to add that the book does not pretend to be, and is not, more than a guide or stepping-stone to more extensive reading, and is chiefly useful for examination purposes.

Legal Studies in the University of Oxford, a Valedictory Lecture delivered before the University, June 10, 1893, by JAMES BRYCE. London: Macmillan & Co. 1893. 8vo. 35 pp.—This eloquent and instructive address, with which the Chancellor of the Duchy of Lancaster quitted the Regius Chair of Civil Law, after occupying it for twenty-three years, is worthy alike of the author and of the occasion. It will repay the perusal of all who are interested in that renascence of Roman law in this country which the ex-professor has done so much to promote.

Rules and Usages of the Stock Exchange. By G. HERBERT STUTFIELD and H. S. CAUTLEY. Second Edition. London: Effingham Wilson & Co. 8vo. xviii and 181 pp.—This useful little hand-book has reached a

second edition. It gives the most recent decisions on the rules of the Stock Exchange, and will doubtless be found valuable both to members and to the public.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XI. 1809–1811 (17 & 18 Vesey—11 East—12 East—2 Taunton—2 Campbell). London: Sweet & Maxwell, Lim. Boston: Little, Brown & Co. 1893. La. 8vo. xvi and 847 pp.

The Revised Reports. Vol. XII. 1811–1813 (1 & 2 Ball & Beatty—19 Ves.—1 Ves. & Beames—13 & 14 East—3 Taunt.—Wightwick—2 Camp.). London: 1893. La. 8vo. xv and 791 pp.

A Treatise on the Law of Executors and Administrators. By the Right Hon. Sir E. V. WILLIAMS. Ninth Edition. By the Hon. Sir ROLAND L. VAUGHAN WILLIAMS. Two vols. London: Stevens & Sons, Lim. Sweet & Maxwell, Lim. 1893. La. 8vo. cxvi, viii and 2131 pp.—Review will follow.

A Treatise on the Law of Partnership. By the Right Hon. Sir NATHANIEL LINDLEY. Sixth Edition. By W. B. LINDLEY. With an Appendix on the Law of Scotland by J. CAMPBELL LORIMER. London: Sweet & Maxwell, Lim. 1893. La. 8vo. lxii and 939 pp.—Review will follow.

The Principles of the Law of Evidence. By W. M. BEST. Eighth Edition. By J. M. LELY. With Notes to American and Canadian Cases by C. F. CHAMBERLAYNE. London: Sweet & Maxwell, Lim. Boston: The Boston Book Co. 1893. La. 8vo. lx and 703 pp.—Review will follow.

Commercial Law. By J. E. C. MUNRO. London: Macmillan & Co. 1893. Sm. 8vo. 191 pp.—Review will follow.

A Handbook of Husband and Wife according to the Law of Scotland. By F. P. WALTON. Edinburgh: W. Green & Sons. 1893. 8vo. lxxi and 510 pp.

A Handbook of Prescription according to the Law of Scotland. By J. H. MILLAR. Edinburgh: W. Green & Sons. 1893. 8vo. xxxvi and 232 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
